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**TRANSCRIPT OF RECORD**

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**Supreme Court of the United States**

**OCTOBER TERM, 1927**

**No. 76**

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**NORTHWESTERN MUTUAL LIFE INSURANCE  
COMPANY, PLAINTIFF IN ERROR,**

**vs.**

**THE STATE OF WISCONSIN**

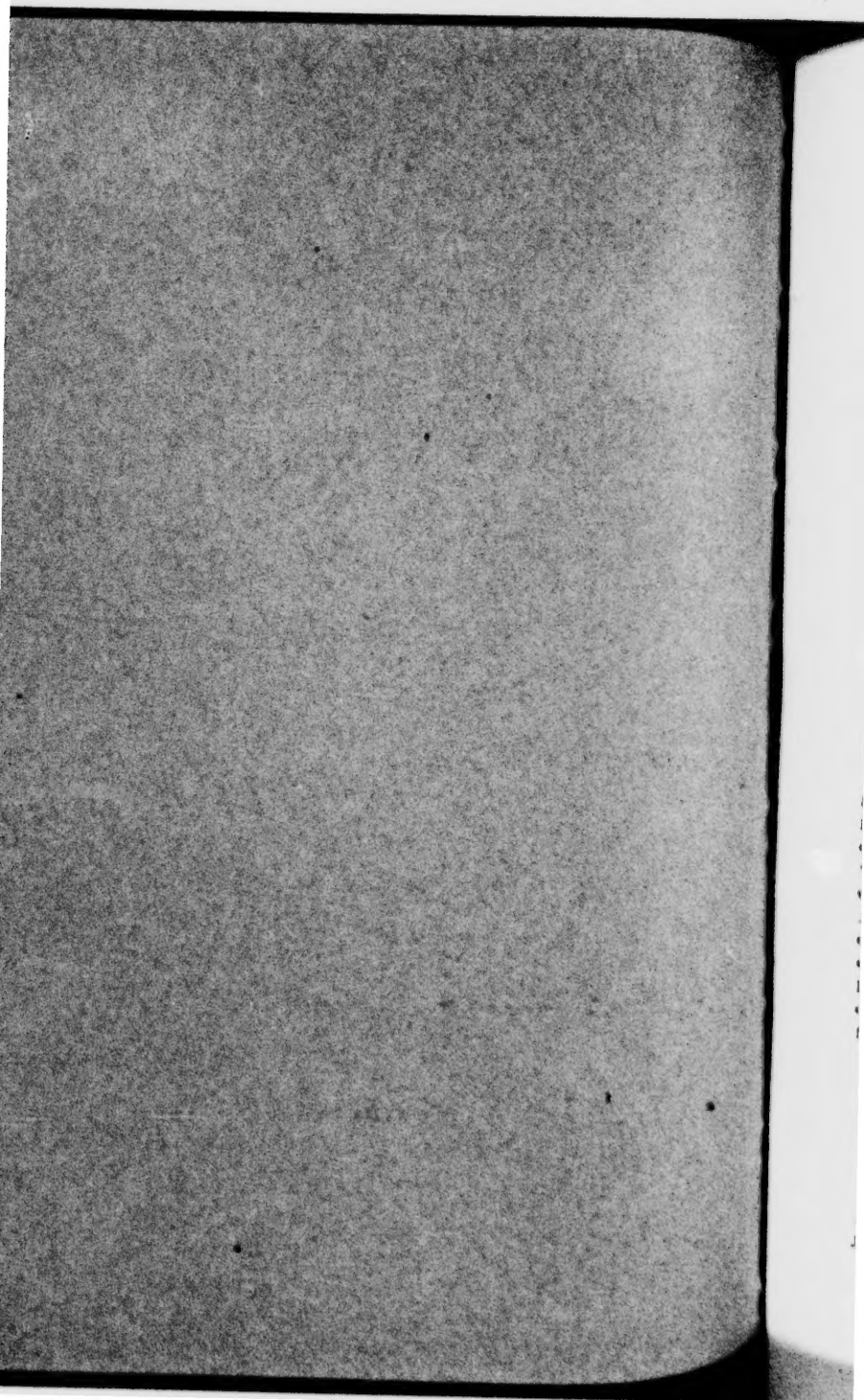
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**IN ERROR TO THE SUPREME COURT OF THE STATE OF  
WISCONSIN**

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**FILED JUNE 2, 1928**

**(81,900)**



(31,989)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 422

NORTHWESTERN MUTUAL LIFE INSURANCE  
COMPANY, PLAINTIFF IN ERROR,

v.

THE STATE OF WISCONSIN

IN ERROR TO THE SUPREME COURT OF THE STATE OF  
WISCONSIN

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[fol. 1] **IN SUPREME COURT OF WISCONSIN**

Calendar No. 174

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,  
Plaintiff,

vs.

THE STATE OF WISCONSIN, Defendant

PETITION FOR WRIT OF ERROR—Filed April 23, 1926

Considering itself aggrieved by the final decision of the Supreme Court in rendering judgment against it in the above entitled case, the plaintiff hereby prays a writ of error from the said decision and judgment to the United States Supreme Court, and an order fixing the amount of a supersedeas bond.

Assignment of errors herewith.

Geo. Lines, Sam T. Swansen, Attorneys for Plaintiff.

## IN SUPREME COURT OF WISCONSIN

ORDER ALLOWING WRIT OF ERROR—Filed April 23, 1926

STATE OF WISCONSIN,

Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by The Northwestern Mutual Life Insurance Company to The State of Wisconsin in the sum of Five hundred (500) Dollars; such bond when approved to act as a supersedeas.

Dated April 23, 1926.

A. J. Vinje, Chief Justice Supreme Court of Wisconsin. (Seal of Supreme Court of Wisconsin.)

[fol. 2] [File endorsement omitted.]

## IN SUPREME COURT OF WISCONSIN

WRIT OF ERROR—Filed April 23, 1926

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Northwestern Mutual Life Insurance Company, a corporation, and The State of Wisconsin, (being Calendar No. 174, August Term 1925 of said Supreme Court), wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened, to the great damage of the said The Northwestern Mutual Life Insurance Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 23 day of April, in the year of our Lord one thousand nine hundred and twenty six.

H. C. Hale, Clerk District Court of the United States,  
for the Western District of Wisconsin. (Seal of  
U. S. District Court, Western Dist. of Wisconsin,  
Madison.)

Allowed, April 23, 1926. A. J. Vinje, Chief Justice, Supreme Court of Wisconsin. (Seal of Supreme Court of Wisconsin.)

[fol. 4] [File endorsement omitted.]

STATE OF WISCONSIN, ss:

# SUPREME COURT

The return to the within writ appears by the schedule hereto annexed.

The return of the Justices of the Supreme Court of the State of Wisconsin.

Arthur A. McLeod, Clerk of Supreme Court, Wisconsin. (Seal of Supreme Court of Wisconsin.)

[fol. 5 & 6] Citation, in usual form, showing service on Herman L. Ekern, filed April 23, 1926, omitted in printing.

[fol. 7] IN SUPREME COURT OF WISCONSIN

[Title omitted]

## ASSIGNMENT OF ERRORS—Filed April 23, 1926

Now comes the above named plaintiff and files herewith its petition for a writ of error, and says that there are errors in the record and proceedings of the above entitled case, and for the purpose of having the same reviewed in the United States Supreme Court makes the following assignment:

1. The said Supreme Court of Wisconsin erred in affirming the judgment entered in the above entitled action by the Circuit Court for Dane County in favor of the defendant and against the plaintiff and dismissing the plaintiff's complaint on the merits and for costs.

2. The said Supreme Court of Wisconsin erred in holding and deciding that Section 76.34, Wisconsin Statutes for 1923, which imposed upon plaintiff, a Wisconsin life insurance company, a tax of three per cent. of its gross income

from all sources (except from premiums and real estate upon which plaintiff had paid a real estate tax), in so far as such gross income was received from bonds and securities issued by the United States, did not constitute or create a burden upon and interference with the power of Congress to borrow money on the credit of the United States, and that said Section 76.34, as respects gross income received from interest on such bonds and securities issued by the United States, did not contravene the provisions of Article 1, Section 8, of the Constitution of the United States.

3. The said Supreme Court of Wisconsin erred in holding and deciding that the three per cent. tax levied and imposed by the State of Wisconsin upon the gross interest received by plaintiff, The Northwestern Mutual Life Insurance Company, on bonds and securities issued by the United States, amounting during the calendar year 1923 to the aggregate sum of \$1,924,787.99, resulting in a tax thereon of \$57,743.64, was not a burden upon and interference with the power of Congress to borrow money upon the credit of the United States, and did not contravene the provisions of Article 1, Section 8, of the Constitution of the United States.

4. The said Supreme Court of Wisconsin erred in holding and deciding that the three per cent. tax levied and imposed by the State of Wisconsin upon the gross interest received by plaintiff, The Northwestern Mutual Life Insurance Company, on bonds and securities issued by the United States, amounting during the calendar year 1923 to the aggregate sum of \$1,924,787.99, resulting in a tax thereon of \$57,743.64, was not a tax upon said bonds and securities of the interest thereon and was not a burden upon and interference with the power of Congress to borrow money upon the credit of the United State and did not contravene the provisions of Section 3701, United States Revised Statutes.

5. The said Supreme Court of Wisconsin erred in holding and deciding that Section 76.34, Wisconsin Statutes for 1923, which imposed upon plaintiff, a Wisconsin life insurance company, a tax of three per cent. of its gross income from all sources (except from premiums and real estate upon which plaintiff had paid a real estate tax), in

so far as \$203,150.00 of such gross income was received during the calendar year 1923 from bonds issued by the United States, commonly known as "Second Liberty Loan Bonds, Converted," resulting in a tax thereon of \$6,094.50, was not a tax upon said bonds or the interest thereon and was not a burden upon and interference with the power of Congress to borrow money upon the credit of the United 1917, 1918, Part 1, p. 502).

6. The said Supreme Court of Wisconsin erred in holding and deciding that Section 76.34, Wisconsin Statutes for 1923, which imposed upon plaintiff, a Wisconsin life insurance company, a tax of three per cent. of its gross income from all sources (except from premiums and real [fol. 9] estate upon which plaintiff had paid a real estate tax), in so far as \$803,250.00 of such gross income was received during the calendar year 1923 from bonds issued by the United States, commonly known as "Third Liberty Loan Bonds," resulting in a tax thereon of \$24,097.50, was not a tax upon said bonds or the interest thereon and was not a burden upon and interference with the power of Congress to borrow money upon the credit of the United States and did not contravene the provisions of the Act of Congress approved April 4, 1918, known as the "Third Liberty Bond Act," (U. S. Stats. 1917, 1918, Part 1, p. 502).

7. The said Supreme Court of Wisconsin erred in holding and deciding that Section 76.34, Wisconsin Statutes for 1923, which imposed upon plaintiff, a Wisconsin life insurance company, a tax of three per cent. of its gross income from all sources (except from premiums and real estate upon which plaintiff had paid a real estate tax), in so far as \$499,375.00 of such gross income was received during the calendar year 1923 from bonds issued by the United States, commonly known as "Fourth Liberty Loan Bonds," resulting in a tax thereon of \$14,981.25, was not a tax upon said bonds or the interest thereon and was not a burden upon and interference with the power of Congress to borrow money on the credit of the United States and did not contravene the provisions of the Act of Congress approved July 9, 1918, known as the "Fourth Liberty Bond Act," (U. S. Stats. 1917, 1918, Part 1, pg. 844).

8. The said Supreme Court of Wisconsin erred in holding and deciding that Section 76.34, Wisconsin Statutes for 1923, which imposed upon plaintiff, a Wisconsin life insurance company, a tax of three per cent. of its gross income from all sources (except from premiums and real estate upon which plaintiff had paid a real estate tax), in so far as \$306,950.78 of such gross income was received during the calendar year 1923 from treasury notes issued by the United States, commonly known as "U. S. A. Treasury Notes," resulting in a tax thereon of \$9,208.53, was not a tax upon said notes or the interest thereon and was not a burden upon and interference with the power of Congress to borrow money upon the credit of the United States and did not contravene the provisions of the act of Congress approved March 3, 1919 known as the "Victory Liberty Loan Act," (U. S. Stats. 1919, Part 1, p. 1309).

[fol. 10] 9. The said Supreme Court of Wisconsin erred in holding and deciding that Section 76.34, Wisconsin Statutes for 1923, which imposed upon plaintiff, a Wisconsin life insurance company, a tax of three per cent. of its gross income from all sources (except from premiums and real estate upon which plaintiff had paid a real estate tax), in so far as \$24,158.45 of such gross income was received during the calendar year 1923 from United States Treasury Bonds issued by the United States, commonly known as "U. S. A. Treasury Bonds," resulting in a tax thereon of \$724.75, was not a tax upon said bonds or the interest thereon and was not a burden upon and interference with the power of Congress to borrow money upon the credit of the United States and did not contravene the provisions of the Act of Congress approved September 24, 1917, known as the "Second Liberty Bond Act," (U. S. Stats. 1917, p. 288, as amended).

10. The said Supreme Court of Wisconsin erred in holding and deciding that Section 76.34, Wisconsin Statutes for 1923, which imposed upon plaintiff, a Wisconsin life insurance company, a tax of three per cent. of its gross income from all sources (except from premiums and real estate upon which plaintiff had paid a real estate tax), in so far as \$87,903.76 of such gross income was received during the

calendar year 1923 from Treasury Certificates of Indebtedness issued by the United States, commonly known as "U. S. A. Treasury Certificates of Indebtedness," resulting in a tax thereon of \$2,637.11, was not a tax upon said Certificates of Indebtedness or the interest thereon and was not a burden upon and interference with the power of Congress to borrow money on the credit of the United States and did not contravene the provisions of the Act of Congress approved September 24, 1917, known as the "Second Liberty Bond Act," (U. S. Stats. 1917, p. 288), as amended by the Act of Congress approved April 4, 1918, known as the "Third Liberty Bond Act," (U. S. Stats. 1917, 1918, Part 1, p. 592), and by the Act of Congress approved March 3, 1919, known as the "Victory Liberty Loan Act," (U. S. Stats. 1919, Part 1, p. 1309).

11. The said Supreme Court of Wisconsin erred in holding and deciding that Section 76.34, Wisconsin Statutes for 1923, which imposed upon plaintiff, a Wisconsin life insurance company, a tax of three per cent. of its gross income from all sources (except from premiums and real estate upon which plaintiff had paid a real estate tax), in so far [fol. 11] as such gross income was received from bonds and securities issued by the United States, did not deprive the plaintiff of its property without due process of law and did not deny to the plaintiff the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States.

For which errors the plaintiff, The Northwestern Mutual Life Insurance Company, prays that the judgment of the Supreme Court of the State of Wisconsin dated the 9th day of February, 1926, be reversed and a judgment rendered in favor of the plaintiff, The Northwestern Mutual Life Insurance Company, and for costs.

Dated April 23, 1926.

Geo. Lines, Sam T. Swansen, Attorneys for the  
Northwestern Mutual Life Insurance Company.

[fol. 12] [File endorsement omitted.]

[fols. 13 & 14] Certificate of lodgment, filed April 26, 1926, omitted in printing.

[fols. 15 & 16] Bond on writ of error for \$500.00, approved and filed April 23, 1926, omitted in printing.

[fol. 17] IN SUPREME COURT OF WISCONSIN

[Title omitted]

PRECIPE FOR RECORD—Filed April 23, 1926

To Arthur A. McLeod, clerk of the Supreme Court of Wisconsin:

The portions of the record in the above entitled case to be incorporated into the transcript of the record to be sent to the Clerk of the United States Supreme Court by virtue of a writ of error heretofore issued are indicated as follows:

1. Petition for writ of error and order allowing the same;
2. Assignment of errors and prayer for reversal;
3. Writ of error;
4. Citation and proof of service;
5. Bond on writ of error;
6. Clerk's certificate as to lodgment;
7. Precipe for record;
8. Summons and proof of service;
9. Complaint;
10. Demurrer;
11. Order of the Circuit Court sustaining demurrer;
12. Judgment Circuit Court dismissing complaint with costs;
13. Opinion Supreme Court of Wisconsin;
14. Final judgment Supreme Court of Wisconsin.

Dated April 23rd, 1926.

Geo. Lines, Sam T. Swansen, Attorneys for Plaintiff.

[fol. 18] [File endorsement omitted.]

[fols. 19-23]

[Caption omitted]

[fols. 24 & 25] IN CIRCUIT COURT OF DANE COUNTY

Case No. 2

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,  
Plaintiff,

vs.

THE STATE OF WISCONSIN, Defendant

SUMMONS—Filed in Circuit Court March 3, 1924; in  
Supreme Court July 16, 1925

The State of Wisconsin to the said defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above entitled action in the court aforesaid; and in case of your failure so to do judgment will be rendered against you according to the demand of the complaint.

George Lines, Sam T. Swansen, Plaintiff's Attorneys.

Post Office address: 210 Wisconsin Street, Milwaukee,  
Milwaukee County, Wisconsin.

[File endorsement omitted.]

[fol. 26]

[File endorsements omitted]

IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

BILL OF COMPLAINT—Filed in Circuit Court April 2, 1924;  
in Supreme Court July 16, 1925

The above named plaintiff, by George Lines and Sam T. Swansen, its attorneys, for complaint in the above entitled action, alleges:

1. Plaintiff (sometimes hereinafter also referred to as Company or the Company) is a corporation, without capital

stock, organized and existing under and by virtue of Chapter 129 of the Private and Local Laws of Wisconsin for the year 1857, and acts amendatory thereof and supplemental thereto, and has power to insure upon the level premium mutual plan the lives of its respective members and to make all and every insurance appertaining to or connected with life risks. Since 1859 plaintiff has been and now is extensively engaged in said business, and for many years past has been and now is so engaged in forty-two states, including Wisconsin, and in the District of Columbia, and has issued and for many years past has had and now has outstanding many thousands of policies insuring the lives of many thousands of persons. All persons insured under plaintiff's policies are members of plaintiff while their respective policies remain in force, and all persons now insured are members. All members were and are during membership entitled to insurance at cost and to participate ratably and equitably in any funds of plaintiff in excess of the cost of insurance.

2. Plaintiff is a purely mutual company and has always conducted its business of life insurance on what is generally known as the "level premium plan," as distinguished from the "pure assessment plan," under which the loss payable on the death of a member is, after the event, contributed [fol. 27] pro rata by the surviving members, and also from the "natural premium plan," under which each member contributes each year the cost of carrying his insurance for that year, which cost increases yearly as his age advances. Under the level premium plan the estimated annual cost of each member's insurance is averaged and the maximum annual contribution which he can be called upon to make is uniform throughout the life of the policy. The member contributes annually during his early years a sum in excess of the natural premium. Such excess contributions augmented by interest thereon are held by plaintiff as a reserve which serves to maintain the insurance in later years when the stipulated level premium would otherwise be insufficient to meet the current cost of insurance.

3. In order to meet and perform its obligations under its policy contracts, it has been necessary and plaintiff has from time to time set aside and accumulated large re-

serves, the minimum of which has for many years been fixed and determined by the laws of Wisconsin and other states where the Company transacts business. The laws of the State of Wisconsin and of all other states in which plaintiff does business require as a condition precedent to the continued transaction of business therein that plaintiff's assets shall not be less than the reserves required by law. In plaintiff's management of assets there is no segregation or special allocation of any part thereof. The reserve is not earmarked or separately invested. The amount of reserve liability for which plaintiff is required to hold assets is computed annually by the Commissioner of Insurance of the State of Wisconsin, and his certificate is accepted by the Insurance Commissioners of all other states in which plaintiff does business, except that prior to 1922 the Insurance Commissioner of Massachusetts made an independent calculation. The only sources of revenue which plaintiff has ever had, or now has, have been and are premiums paid by member policyholders and interest or other income derived from investments.

4. In order to maintain and improve its reserve fund, to meet its policy obligations as they mature, and to furnish insurance to members at cost, plaintiff since its organization has been and now is authorized to keep and has kept [fol. 28] its reserve funds and other assets invested in income producing securities. Its assets are invested in an office building and other real estate acquired through foreclosure, in United States, State, municipal, railroad and utility bonds, bonds and notes secured by mortgages on real estate, and loans to policyholders.

Ever since organization, and while plaintiff has transacted business, the statutes of Wisconsin have defined the securities or assets in which plaintiff could invest its funds, limiting investments to safe and sound securities yielding income moderate in amount. These statutes, modified somewhat from time to time so as to enlarge the field, have remained without material change since 1917 and limit plaintiff's investments to—

(a) Lawfully authorized bonds or other evidences of indebtedness of the United States, or any State or of the

District of Columbia, or of the Dominion of Canada or of any province or city thereof.

(b) Lawfully authorized bonds of any county, city, town, village, or school district, or of any other governmental or civil division having a population of 50,000 or more, within the United States, or the District of Columbia, which are direct obligations of the municipality or district or division issuing the same.

(c) Loans secured by mortgages upon real estate in the United States or the District of Columbia, not exceeding 50% of the fair market value of the property mortgaged.

(d) Bonds of terminal, belt line, and railroad companies in the United States or Canada, adequately secured by mortgage or pledge of property of the corporation issuing them, upon which no default in payment of interest has occurred within three years of the date of investment or issuance of the bonds.

(e) Bonds of street or interurban railway corporations, of heat, light and power companies operating in cities in the United States with a population of not less than 25,000 inhabitants, which bonds are adequately secured by mortgage upon the franchises and property of such corporation, [fol. 29] and upon which bonds interest has been paid for not less than three years prior to investment.

(f) Mortgage bonds of the farm banks authorized under the Federal Farm Loan Act, and in obligations secured by mortgages or trust deeds authorized in subdivision (e) above.

(g) Loans upon collateral security of any of the foregoing, not exceeding 90% of the market value of such securities.

(h) Loans upon the security of its own policies to an amount not exceeding the surrender value.

(i) Evidences of indebtedness other than those specified above if the same are eligible for discount, rediscount, purchase or sale by Federal Reserve Banks; but such investments not to exceed at any time one third of its unappropriated surplus or contingency reserve as defined in Section

195a of the Wisconsin Statutes. (Sec. 1951, Wis. Stats. for 1917 and 1921.)

5. Plaintiff has for many years, as authorized by the laws of the State of Wisconsin, invested in bonds and securities issued by the United States. During the calendar year 1923 plaintiff owned large amounts of bonds and securities issued by the United States, and received considerable sums of money as interest thereon, as appears by the statement below showing the amount of interest received during said calendar year and from what United States securities, as follows:

Second Liberty Loan 1917	\$203,150 00
Third   "       "       1918	803,250 00
Fourth   "       "       1918	499,375 00
U. S. A. Treasury Notes	306,950 78
U. S. A. Treasury Bonds	24,158 45
U. S. A. Treasury Certificates of Indebtedness	87,903 76
	<hr/>
	\$1,924,787 99

Since February 1862 the statutes of the United States have provided:

"All stocks, bonds, treasury notes and other obligations of the United States shall be exempt from taxation by or under state or municipal or local authority." (U. S. R. [Vol. 30] S., Sec. 3701.)

The above Liberty Loan Bonds, United States Treasury Certificates and Treasury Notes and Bonds were issued under authority of the Act of Congress approved April 24, 1917, (U. S. Stats. 1917, p. 35), which provides that: "The principal and interest thereof shall be payable in United States gold coin of the present standard of value, and shall be exempt both as to principal and interest from all taxation estate or inheritance taxes imposed by authority of the United States or its possessions, or by any State or local taxing authority;" and by authority of the Act of Congress approved September 24, 1917, (U. S. Stats. 1917, p. 288), as amended by the Acts of April 4, 1918, (U. S. Stats. 1917 & 1918, Part 1, p. 502), July 9, 1918, (U. S. Stats. 1917 & 1918, Part 1, p. 844), September 24, 1918, (U. S. Stats. 1917

& 1918, Part 1, p. 965), and March 3, 1919, (U. S. Stats. 1919, Part 1, 1309), which Acts provide that: "All such bonds and certificates shall be exempt, both as to principal and interest, from all taxation now or hereafter imposed by the United States, any State, or any of the possessions of the United States, or by any local taxing authority, except (a) estate or inheritance taxes, and (b) graduated additional income taxes, commonly known as surtaxes, and excess profits and war profits taxes, now or hereafter imposed by the United States, upon the income or profits of individuals, partnerships, associations, or corporations."

6. During the year 1923, and for many years prior thereto, the statutes of Wisconsin regulating the business of life insurance within the State and imposing license fees or taxes thereon, have provided as follows:

Section 76.34. "Every company . . . transacting the business of life insurance within this state . . . shall, on or before the first day of March, in each year, pay into the state treasury as an annual license fee for transacting such business the amounts following:

(1) If such company . . . is organized under the laws of this state, three per centum of its gross income from all sources for the year ending December thirty-first, next prior to said first day of March excepting therefrom income from rents of real estate upon which said company . . . has paid the taxes assessed there [fol. 31] on, and excepting also premiums collected on policies of insurance and contracts for annuities."

(2) Foreign companies.

(3) "Such license, when granted shall authorize the company . . . to whom it is issued to transact business until the first day of March of the ensuing year, unless sooner revoked or forfeited. The payment of such license fee shall be in lieu of all taxes for any purpose authorized by the laws of this state, except taxes on such real estate as may be owned by such company . . ."

Section 70.11. "The property in this section described is except from taxation, to wit:

. . . . .

(14) All the personal property of all insurance companies that now are or shall be organized or doing business in this state."

Section 1947 5. "No life insurance corporation whatever shall do any business in this state, nor shall any person act as agent or otherwise within this state in receiving or procuring applications for life insurance or in any manner aid in transacting such business for any such corporation until it shall have first procured a license from said commissioner authorizing it to issue policies of insurance in this state and have paid therefor the license fee required to be paid by section 76.35 \* \* \*."

Section 1948. "No company shall transact business in this state until it shall have obtained a license therefor from the commissioner of insurance. No such license shall be issued until the company has complied with all the requirements of the laws of this state, nor until after such examination as he may require, the commissioner is satisfied that its assets are properly and safely secured and exceed its liabilities, valuing its policies as provided by the laws of this state."

7. Pursuant to said Section 76.34 and the regulations prescribed by the Commissioner of Insurance of the State of Wisconsin, plaintiff on the 28th day of February, 1924, presented to and filed with said Commissioner a statement in the form prescribed by him, showing the amount of plaintiff's gross income for the calendar year ending December 31, 1923, upon which the license fee or tax of 3%, prescribed by said Section 76.34 of the Wisconsin Statutes, should be computed, as understood and claimed by plaintiff. A copy of said statement is hereto attached, marked "Exhibit A" and made a part of this complaint. In said [fol. 32] statement, as appears therefrom, plaintiff excluded from taxable income the interest from the above described United States tax exempt bonds, but showed the amount of such interest received during the year, which statement so made as aforesaid was accepted by the Commissioner of Insurance and by the State Treasurer. At the time of filing said return plaintiff paid to the State Treasurer of said State a tax or license fee of 3% of the amount of gross income admitted by it in said return to be taxable, which

sum said Commissioner of Insurance refused to accept as full payment of plaintiff's license fee or tax for the year beginning March 1st, 1924, but on the contrary insisted and demanded, as hereinafter more fully stated, that plaintiff include in gross income subject to all interest and income received from said United States tax-free bonds.

8. Prior to 1923, plaintiff in its annual statements filed with the Commissioner of Insurance as the basis for its annual license fee or tax, excluded interest received from United States tax-exempt bonds and securities, and said statements had been uniformly accepted and the exclusion acquiesced in by the Commissioner of Insurance. On or about October 24, 1923, the Hon. W. Stanley Smith, who then was and now is the duly appointed, qualified and acting Commissioner of Insurance of the State of Wisconsin, demanded of plaintiff in writing that it forthwith pay as an additional tax or license fee for each license year 1919 to 1923 inclusive, 3% of all interest received during each calendar year 1918 to 1922 inclusive. Thereafter such proceedings and negotiations were had between plaintiff and said Commissioner of Insurance that plaintiff, in order to prevent said Commissioner of Insurance from revoking its then license to transact business in the State, was compelled to and on the 10th day of January, 1924, did pay into the state treasury involuntarily and under protest as additional license fees or taxes for the license years 1919 to 1923, inclusive, 3% of all interest received during the calendar years 1918 to 1922 inclusive, on tax-exempt bonds and securities issued by the United States. As plaintiff's license approached the expiration period, and in order [fol. 33] to ascertain the amount of license fee or tax which the Commissioner of Insurance would require plaintiff to pay to procure a license to do business in the State for the year beginning March 1, 1924, plaintiff directed a letter to said Commission of Insurance dated February 18, 1924, a copy of which marked "Exhibit B" is hereto attached and made a part of this complaint. Under date of February 19, 1924, said Commissioner of Insurance replied, a copy whereof marked "Exhibit C" is hereto attached and made a part of this complaint.

9. On the 28th day of February, 1924, plaintiff presented to and filed with said Commissioner of Insurance said statement, "Exhibit A," showing the amount of its income for the year ending December 31, 1923, to be \$26,787,736.36, upon which a license fee or tax of 3% prescribed by said Section 76.34 should be computed as claimed by plaintiff, and paid into the state treasury 3% of said sum, amounting to \$803,632.09, and obtained a receipt for such payment signed by the State Treasurer of the State of Wisconsin and countersigned by the State Treasurer of the State of Wisconsin and countersigned by the Secretary of State as Auditor of said State. A copy of said receipt marked "Exhibit D" is hereto attached and made a part of this complaint.

10. Said statement, "Exhibit A," further showed that plaintiff had received during the year ending December 31, 1923, in addition to the income stated above the further sum of \$1924,787.99 as interest on bonds and securities issued by the United States, which bonds and securities and the income and interest therefrom plaintiff claimed and insisted were and are not subject to taxation in any form in the State of Wisconsin, nor could said bonds and securities or the interest therefrom be subjected to any burden by said State. Notwithstanding the claim so made and presented, said Commissioner of Insurance insisted that plaintiff was, under Section 76.34, Wisconsin Statutes, legally obligated to pay, as a part of its license fee or tax for the year beginning March 1, 1924, an additional amount equal to 3% of its gross income from such tax exempt United States bonds and securities, and demanded that plaintiff pay as a condition precedent to obtaining such license the additional fee or tax of \$57,743.64 and threatened to withhold a license to plaintiff to transact business [fol. 34] in the State of Wisconsin for the year beginning March 1, 1924, unless and until said additional sum was paid.

11. By reason of the insistence of said Commissioner of Insurance that plaintiff was by said Section 76.34, Wisconsin Statutes, required to pay as part of its license fee or tax for the privilege of transacting business in the State of Wisconsin for the year beginning the first day of March,

1924, 3% upon said sum of \$1,924,787.99, amounting to said sum of \$57,743.64, and by reason of the statement and threat of said Commissioner of Insurance that in case plaintiff failed to pay said sum said Commissioner would withhold from the plaintiff a license to transact business in the State of Wisconsin from and after the first day of March, 1924, and refuse to permit plaintiff to transact its business in said State, plaintiff did on said 28th day of February, 1924, pay into the state treasury of the State of Wisconsin involuntarily and under protest the said sum of \$57,743.64, of which protest a copy is hereto attached marked "Exhibit E" and made a part of this complaint. Thereupon plaintiff received a receipt for said payment, also signed by the said State Treasurer and countersigned by the Secretary of State as aforesaid, a copy of which receipt marked "Exhibit F" is hereto attached and made a part of this complaint. Upon the payment of said additional sum of \$57,743.64, said Commissioner of Insurance issued to the plaintiff a license to do business in the State of Wisconsin as provided by law.

12. By reason of the improper and incorrect inclusion of interest received on United States securities, exempt from taxation as aforesaid, in plaintiff's gross income for the calendar year 1923, an additional tax or fee amounting to \$57,743.64 was assessed and imposed on plaintiff for the license year 1924, and plaintiff claims and alleges that said sum and the whole thereof should be refunded and repaid because illegally collected.

13. The act of the Commissioner of Insurance of the State of Wisconsin in compelling plaintiff under and by virtue of said Section 76.34, Wisconsin Statutes, to pay a tax or license fee for the year 1924 of 3% of the gross income from [fol. 35] the United States tax exempt securities aforesaid, was unlawful, null and void to plaintiff's great damage and injury, and was a direct tax and burden upon and interference with the right and power of Congress to borrow money on the credit of the United States, as authorized by Article I, Section 8, (2) and (18), U. S. Constitution, and violated the laws of the United States enumerated below, whereby all the bonds and securities above described were and are exempt from the tax so imposed and collected, that is to say:

Sec. 3701, U. S. R. S., the Act of Congress approved April 24, 1917, known as the "First Liberty Bond Act" (U. S. Stats. 1917, p. 35);

The Act of Congress approved September 24, 1917, known as the "Second Liberty Bond Act" (U. S. Stats. 1917, p. 288);

The Act of Congress approved April 4, 1918, known as the "Third Liberty Bond Act" (U. S. Stats. 1917 & 1918, Part 1, p. 502);

The Act of Congress approved July 9, 1918, known as the "Fourth Liberty Bond Act" (U. S. Stats. 1917 & 1918, Part 1, p. 844);

The Act of Congress approved September 24, 1918, entitled "An Act to Supplement the Second Liberty Bond Act, as amended, and for other Purposes" (U. S. Stats. 1917 & 1918, p. 965), and

The Act of Congress approved March 3, 1919, known as the "Victory Liberty Loan Act" (U. S. Stats. 1919, Part 1, p. 1309).

14. The act of said Commissioner of Insurance of the State of Wisconsin in compelling plaintiff under and by virtue of said Section 76.34, Wis. Stats., to pay a tax or license fee for the year 1924 of 3% of gross income from United States tax exempt securities aforesaid, was unlawful, null and void to plaintiff's great damage and injury, and deprived plaintiff of its property without due process of law, and denied to plaintiff the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States.

Wherefore plaintiff prays judgment against the defendant for the sum of \$57,743.64, with interest thereon from the 28th day of February, 1924, together with its costs and disbursements of this action.

George Lines, Sam T. Swansen, Attorneys for Plaintiff.

*Duly sworn to by W. D. Van Dake, Jurat omitted in printing.*

[fol. 37] "EXHIBIT A" TO BILL OF COMPLAINT

## Copy

The Northwestern Mutual Life Insurance Company, Milwaukee, Wisconsin

Statement showing gross income from all sources for the year ending Dec. 31, 1923, upon which is computed the three per centum tax as an annual license fee for the privilege of transacting business in the State of Wisconsin for the year ending March 1, 1925, required under chapter 434, Laws of Wisconsin 1915, Section 76.34

## Gross Income

Interest on mortgage loans	\$13,628,841 32
Interest on bonds and dividends on stocks	7,788,298 58
Interest on premium notes, policy loans or liens	4,934,233 85
Interest on deposits in banks	164,773 42
Interest collected on restoration of policies	16,022 70
Miscellaneous interest receipts	2,107 68
Profit on sale of bonds and stocks \$39,455.90, less loss on sale of bonds \$33,838.22	5,617 68
Discount accrued on bonds \$347,403.35, less \$99,562.22 for amortization of premiums	247,841 13
Total Income	\$26,787,736 36
Three per centum thereon	\$803,632 09

\*Interest received on obligations of the United States of America, exempt from taxation in accordance with the provisions of the acts authorizing the issue thereof, not included:

Second Liberty Loan 1917	\$203,150 00
Third " " 1918	803,250 00
Fourth " " 1918	499,375 00
U. S. A. Treasury Notes	306,950 78
U. S. A. Treasury Bonds	24,158 45
U. S. A. Treasury Certificates of Indebtedness	87,903 76
	\$1,924,787 99

Milwaukee, Wisconsin, February 29, 1924.

[fol. 38] "EXHIBIT B" TO BILL OF COMPLAINT

Copy

Milwaukee, Wis., February 18, 1924.

Hon. W. Stanley Smith, Insurance Commissioner, Madison,  
Wisconsin.

DEAR SIR: The present license of the Northwestern will expire the first of March. Recently the Company paid the State Treasurer a tax for five years last past upon such portion of the Company's gross income as is represented by interest received from its United States tax exempt securities. Upon further study of the question I am convinced the Company's position is correct.

I am writing to inquire if the Company may not make up its return for the calendar year 1923 and omit interest from its United States tax free bonds. If the Company makes its return on that basis and presents it to you with check for the tax or license fee called for by such report, what will be the action of your Department?

(Signed) Yours very truly, Sam T. Swansen, As-  
sistant Counsel.

S R.

[fol. 39] "EXHIBIT C" TO BILL OF COMPLAINT

Copy

The State of Wisconsin, Department of Insurance,  
Madison

February 19, 1924.

Mr. Sam. T. Swansen, Asst. Counsel the Northwestern  
Mutual Life Ins. Co., Milwaukee, Wisconsin.

DEAR SIR: In reply to your letter of February 18th regarding the taxable base, let me state that I am in thorough accord with the Attorney General's opinion of October 19, 1923, and that nothing has transpired since which would cause me to recede from my former position in this matter.

(Signed) Yours very truly, W. Stanley Smith, Com-  
missioner of Insurance.

WSS c.

[fol. 40] "EXHIBIT D" TO BILL OF COMPLAINT

Copy

No. 10021. General Fund. \$803,632.09

Treasury Department

Madison, Wis., Feb. 28, 1924.

Received from the Northwestern Mutual Life Ins. Co. eight hundred three thousand six hundred thirty two & 09/100 dollars on account of State Tax.

Solomon Levitan, State Treasurer. W.

Countersigned: Fred R. Zimmerman, Secretary of State, as Auditor.

[fol. 41] "EXHIBIT E" TO BILL OF COMPLAINT

Copy

To the Hon. W. Stanley Smith, Commissioner of Insurance,  
and the Hon. Solomon Levitan, State Treasurer of Wisconsin, Madison, Wisconsin.

GENTLEMEN: You and each of you are hereby notified that the Northwestern Mutual Life Insurance Company of Milwaukee, Wisconsin, a corporation duly organized under the laws of said State, does hereby, on the order of said Commissioner of Insurance, involuntarily and under protest, pay to you, the said State Treasurer, the sum of Fifty seven thousand seven forty three and 64/100 Dollars (\$57,743.64), being the amount claimed by said Commissioner of Insurance to be due the State of Wisconsin from said Company as a part of its license fee or tax for the year 1923.

Said payment and the whole thereof is made involuntarily, under duress, under protest, under coercion and compulsion, to prevent said Commissioner of Insurance from refusing to license said Company to do business in the State of Wisconsin for the year beginning March 1, 1924.

Said license fee or tax so demanded and paid is three per cent. of the gross interest received by said Company

from bonds owned by it and issued by the United States, as follows:

Second Liberty Loan 1917	\$203,150 00
Third    "    "    1918	803,250 00
Fourth    "    "    1918	499,375 00
U. S. Treasury Notes	306,950 78
U. S. Treasury Bonds.....	24,158 45
U. S. Treasury Certificates of Indebtedness	87,903 76
Total	<hr/> \$1,924,787 99

A tax of three per cent, upon said gross interest amounting to Fifty-seven thousand seven hundred forty-three and 64/100 Dollars (\$57,743.64) is the sum herewith paid under protest.

All of said bonds were issued by the United States pursuant to the Acts of Congress stated below, passed under authority of the Constitution of the United States, providing: "The Congress shall have power \* \* \* to borrow money on the credit of the United States." (Art. I, Sec. 8, United States Constitution.)

The Liberty Loan Bonds, United States Treasury Notes and Bonds, and United States Treasury Certificates were issued under authority of the Act of Congress approved April 24, 1917, (U. S. Stats. 1917, p. 35, Chap. 4—65th Congress, First Session), which provides that "the principal and interest thereof shall be payable in United States gold coin of the present standard of value, and shall be exempt both as to principal and interest from all taxation except estate or inheritance taxes imposed by authority of the United States or its possessions, or by any state or local taxing authority"; and by authority of the Act of Congress approved September 24, 1917, (U. S. Stats., p. 288—1917, Chap. 56—65th Congress, First Session, and subsequent amendments thereto), which provides that: "All such bonds and certificates shall be exempt, both as to principal and interest, from all taxation now or hereafter imposed by the United States, any state, or any of the possessions of the United States, or by any local taxing authority, except (a) estate or inheritance taxes, and (b) graduated additional income taxes, commonly known as surtaxes, and excess profits and war profits taxes, now or hereafter im-

posed by the United States, upon the income or profits of individuals, partnerships, associations, or corporations."

Said payment is made with protest against the validity of such fee or tax, and each and every part of the same, and against the right of you or either of you or of the State of Wisconsin to collect or receive the amount so paid, or any part thereof, for the reason that all the interest received by said Company from said bonds was and is exempt from taxation in any form by the State of Wisconsin, and the inclusion of the gross amount of interest received from said bonds as part of the gross income of said Company subject to tax for the year aforesaid is illegal and void, being in fact a tax and burden upon the securities of the United States declared by the Acts of Congress to be exempt from taxation for any purpose whatever.

And you and each of you are hereby informed that said [fol. 43] Company claims hereby that collection of the tax or fee protested as aforesaid is illegally exacted by you and each of you, and you are hereby notified that unless repaid said Company at the proper time and in the proper manner will institute suit or take such other appropriate legal proceedings for the recovery of the fee or tax so paid under protest as aforesaid as it may be advised, and it hereby makes demand of you and each of you for the repayment of the tax or fee so paid under protest.

Dated at Milwaukee, Wisconsin, this 28th day of February, 1924.

Executed in triplicate.

The Northwestern Mutual Life Insurance Company,  
by (Signed) Wm. D. Van Dyke, President.

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[fols. 44 & 45] "EXHIBIT F" TO BILL OF COMPLAINT

Copy

No. 10022. General Fund. \$57,743.64

Treasury Department

Madison, Wis., Feb. 28, 1924.

Received from the Northwestern Mutual Life Ins. Co.  
fifty seven thousand seven hundred forty three & 64/100

dollars on account of tax of three per cent on gross interest on U. S. Tax free securities.

Paid under protest.

Solomon Levitan, State Treasurer. W.

Countersigned: Fred R. Zimmerman, Secretary of State,  
as Auditor.

[fols. 46 & 47] IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

DEMURRER—Filed in Circuit Court April 2, 1924; in Supreme Court July 26, 1925

Comes now the above named defendant, by its attorneys, Herman L. Ekern, Attorney General, and R. M. Rieser, Deputy Attorney General, and demurs to the complaint of the plaintiff herein, on the ground and for the reason that the complaint in said action does not state facts sufficient to constitute a cause of action.

Wherefore defendant demands that said action be dismissed and that plaintiff take nothing thereby, and that the defendant do have and recover its costs and disbursements herein.

Herman L. Ekern, Attorney General; R. M. Rieser,  
Deputy Attorney General, Attorneys for the Defendant.

[File endorsements omitted.]

[fols. 48 & 49] IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

ORDER SUSTAINING DEMURRER—Filed in Circuit Court June 2, 1925; in Supreme Court July 16, 1925

This action having been brought to trial on the issue of law raised by the demurrer of the defendant to the complaint herein, and after considering the briefs and arguments of counsel,

It is ordered that said demurrer be sustained and that the defendant have judgment thereon but with leave to the plaintiff to amend the complaint within twenty days from May 16, 1925, being the date of the direction for the order sustaining said demurrer.

By the Court.

E. Ray Stevens, Circuit Judge.

[File endorsement omitted.]

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[fols. 50 & 51] IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

JUDGMENT—Filed in Circuit Court June 17, 1925; in Supreme Court July 16, 1925

An order having been entered in this action and served upon the plaintiff, sustaining the demurrer to the complaint herein and giving the said plaintiff leave to amend its complaint within twenty days from the sixteenth day of May, 1925, and the plaintiff not having served any amended complaint within said time, and more than twenty days having elapsed since the sixteenth day of May, 1925,

Now, on motion of Herman L. Ekern, Attorney General and C. A. Erikson, Deputy Attorney General, attorneys for defendant,

It is ordered and adjudged that the complaint herein be, and the same is hereby dismissed on its merits, and that defendant have and recover its costs of said plaintiff, taxed at \$13.28

By the Court.

Herbert F. Hansen, Clerk

June 17, 1925.

[File endorsement omitted.]

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[fol. 52] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 53] Minute entry of argument and submission December 10, 1925, omitted in printing.

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[fols. 54 & 55] IN SUPREME COURT OF WISCONSIN

[Title omitted]

JUDGMENT—February 9, 1926

This cause came on to be heard on appeal from the judgment of the Circuit Court of Dane County, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the Circuit Court of Dane County, in this cause, be and the same is hereby affirmed, with costs against the said appellant, taxed at the sum of Twenty five and no 100 Dollars (\$25.00).

Justice Stevens took no part.

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[fol. 56] IN SUPREME COURT OF WISCONSIN

[Title omitted]

Appeal from a Judgment of the Circuit Court for Dane  
County

E. Ray Stevens, Circuit Judge

STATEMENT RE MANDATE

ROSENBERG, J.:

This is a companion case to Number 173, decided herewith. The mandate in this case will be the same as in that.

By the Court: Judgment affirmed.

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[fol. 57] Clerk's certificate to foregoing transcript omitted in printing.

## [fol. 58] IN SUPREME OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION  
OF PARTS OF RECORD TO BE PRINTED—Filed June 9, 1926

Plaintiff in error intends to rely upon the following points of law:

1. A state law which operates to impair the credit of the United States is null and void.

2. The State of Wisconsin cannot by tax or other means impose a burden upon the United States or any of its agencies or instrumentalities employed in carrying out its sovereign powers.

3. The bonds and securities described in the complaint, being obligations issued by the United States, are government instrumentalities employed in carrying out the sovereign power to borrow money on the credit of the United State, under Article I, section 8, subd. 2, of the Constitution of the United States.

4. Section 76.34, Wisconsin Statutes 1921 (numbered sec. 1211.35 in Wis. Stats. for 1919, and sec. 51.32 in Wis. Stats. for 1917), imposes upon plaintiff in error a tax involving the exercise by the State of the power of taxation, and not the police power.

5. Section 76.34, Wisconsin Statutes 1921 (numbered sec. 1211.35 in Wis. Stats. for 1919, and sec. 51.32 in Wis. Stats. for 1917, which imposes upon plaintiff in error, a Wisconsin life insurance company, a tax of three per cent. of its gross income from all sources (except from premiums and real estate upon which plaintiff in error has paid a real estate tax), including, as construed by the Supreme Court of the State of Wisconsin, gross interest received from bonds and securities issued by the United States, and thereby compelling plaintiff in error to pay annually a large tax on account of gross interest received from such bonds and securities, imposes a direct burden upon such bonds and securities, and to that extent contravenes Article I section 8, subd. 2, of the United States Constitution, and is null and void.

6. Section 76.34, Wisconsin Statutes 1921 (numbered sec. 1211.35 in Wis. Stats. for 1919, and sec. 51.32 in Wis. Stats. for 1917), which imposes upon plaintiff in error, a Wisconsin life insurance company, a tax of three per cent. of its gross income from all sources (except from premiums and real estate upon which plaintiff in error has paid a real estate tax), including, as construed by the Supreme Court of the State of Wisconsin, gross interest received from bonds and securities issued by the United States, imposes a burden upon and interference with the power of Congress to borrow money upon the credit of the United States, impairs the credit of the United States, and as respects gross interest received from such bonds and securities, contravenes the provisions of Article I, section 8, subd. 2, of the Constitution of the United States.

7. A state revenue law, whatever its form, contravenes Article I, section 8, subd. 2, of the Constitution of the United States, and is null and void in so far as it reaches directly the bonds and securities issued by the United States in such a way that the value of such bonds and securities or the gross interest received from them increases directly the tax or sum exacted by the State under its taxing power.

8. Section 76.34, Wisconsin Statutes 1921 (numbered sec. 1211.35 in Wis. Stats. for 1919, and sec. 51.32 in Wis. Stats. for 1917), which imposes on plaintiff in error, a Wisconsin life insurance company, a tax of three per cent. of its gross income from all sources (except from premiums and real estate upon which plaintiff in error has paid a real estate tax), including, as construed by the Supreme Court of the State of Wisconsin, gross interest received from bonds and securities issued by the United States, reaches such bonds and securities directly in such a way that the gross interest received therefrom directly increases the tax levied by the State under its taxing power.

9. A state revenue law which taxes directly the gross receipts from or the business of interstate commerce, or the article carried in interstate commerce, or the gross [fol. 60] capital employed therein, or requires a license to carry on interstate commerce, is a regulation of and a burden upon such commerce, and void under Article I, section 8, subd. 3, of the United States Constitution.

10. To protect and make effective the sovereign power of the United States to borrow money on the credit of the United States, Congress may by law restrain and prevent a state from imposing any tax or burden upon the principal and interest of bonds and securities issued by the Federal Government.

11. Article I, section 8, subds. 2 and 18, and Article VI of the Federal Constitution, and the laws of Congress passed pursuant thereto, more particularly the laws exempting from all state taxation both principal and interest of bonds and securities issued by the United States—expressly and positively prohibit and prevent the State of Wisconsin from taxing or otherwise imposing any burden upon such bonds and securities, or the ownership thereof, or upon the interest received therefrom.

12. Plaintiff in error, as a citizen of the United States whose charter powers authorize it to purchase and own securities, may, by virtue of the Constitution of the United States and the laws of Congress passed pursuant thereto, without the consent or approval of the State of Wisconsin, legally purchase and own bonds and securities issued by the United States. The State of Wisconsin cannot take such right away or burden the exercise thereof, or require plaintiff in error to agree, as a condition of doing business in the state, that it pay a tax to the state of a specific percentage of its gross interest received from such bonds and securities.

13. The right of the State of Wisconsin to tax or otherwise impose a burden upon bonds and securities issued by the United States is a question of power, and not the amount of tax or extent of the burden imposed.

14. Section 76.34, Wisconsin Statutes 1921 (numbered sec. 1211.35 in Wis. Stats. for 1919, and sec. 51.32 in Wis. Stats. for 1917), which imposes upon plaintiff in error, a Wisconsin life insurance company, a tax of three per cent. of its gross income from all sources (except from premiums and real estate upon which plaintiff in error has paid a real estate tax), including, as construed by the Supreme Court [Vol. 61] of the State of Wisconsin, gross interest received from bonds and securities issued by the United States, deprives plaintiff in error of its property without due process

of law in so far as such gross income is received from such bonds and securities, and denies to it equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States.

Plaintiff in error designates the following parts of the record as necessary for the consideration of the points of law above stated:

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4. Citation	5, 6
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13. Certificate of Clerk of Circuit Court and return to Supreme Court	57
14. Judgment, Wisconsin Supreme Court	59
15. Opinion, Wisconsin Supreme Court	60-70
16. Certificate of Clerk Wisconsin Supreme Court	71

Dated this 3rd day of June, 1926.

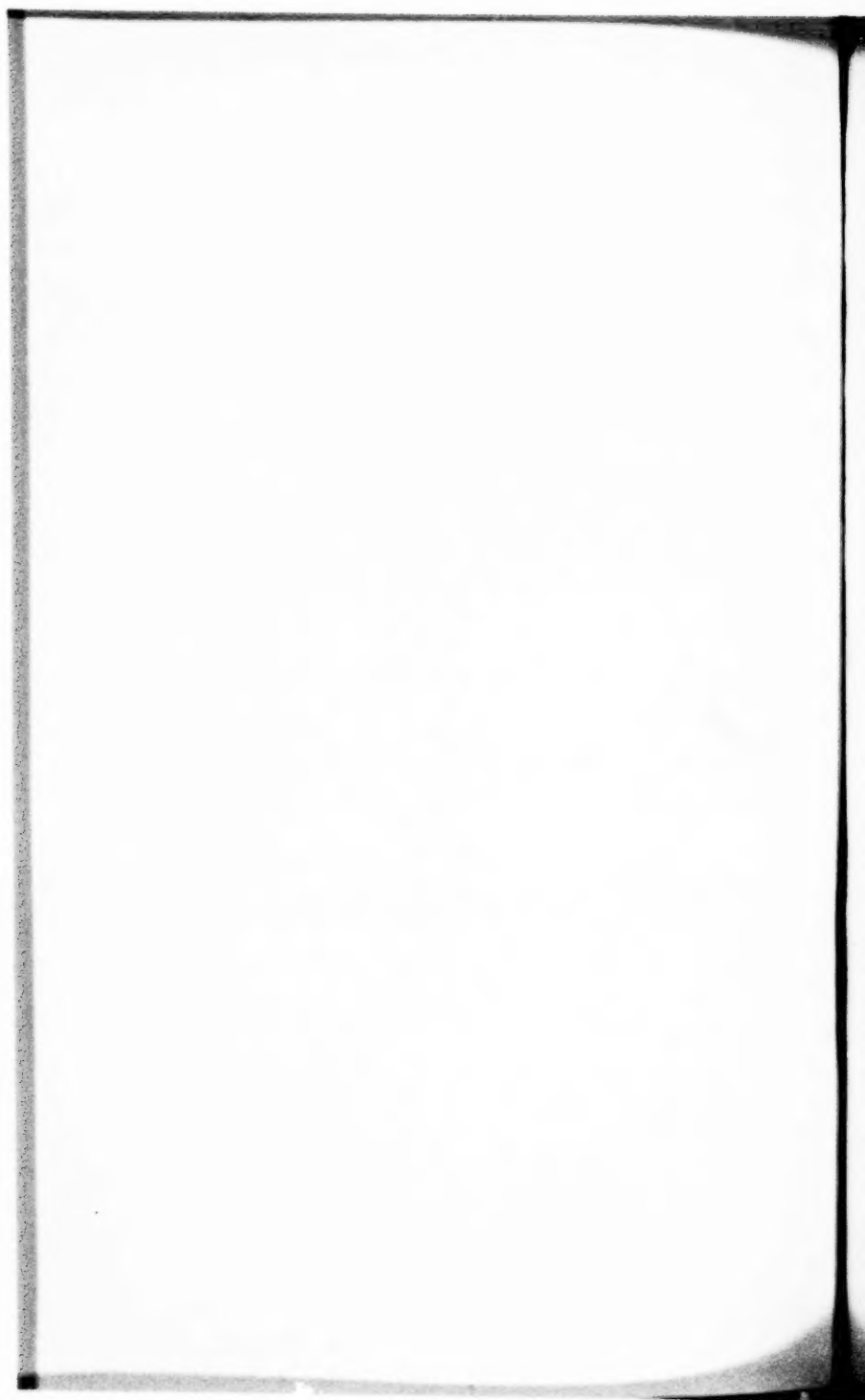
Geo. Lines, Counsel for Plaintiff in Error.

[fol. 62] Due service of the above statement of points and designation of record to be printed admitted this 3rd day of June, 1926.

Herman L. Ekern, Attorney General, Counsel for Defendant in Error.

[fol. 63] [File endorsement omitted.]

Embraced on cover: File No. 31,989. Wisconsin Supreme Court, Term No. 422. Northwestern Mutual Life Insurance Company, plaintiff in error, vs. The State of Wisconsin. Filed June 2nd, 1926. File No. 31,989.



**In the United States  
Supreme Court**

**October Term, 1927**

FILED

OCT 11 1927

CHARLES ELMORE CROPLEY  
CLERK

THE NORTHWESTERN MUTUAL  
LIFE INSURANCE COMPANY,  
*Plaintiff in Error,*

vs.

THE STATE OF WISCONSIN,  
*Defendant in Error.*

No. 75.

THE NORTHWESTERN MUTUAL  
LIFE INSURANCE COMPANY,  
*Plaintiff in Error,*

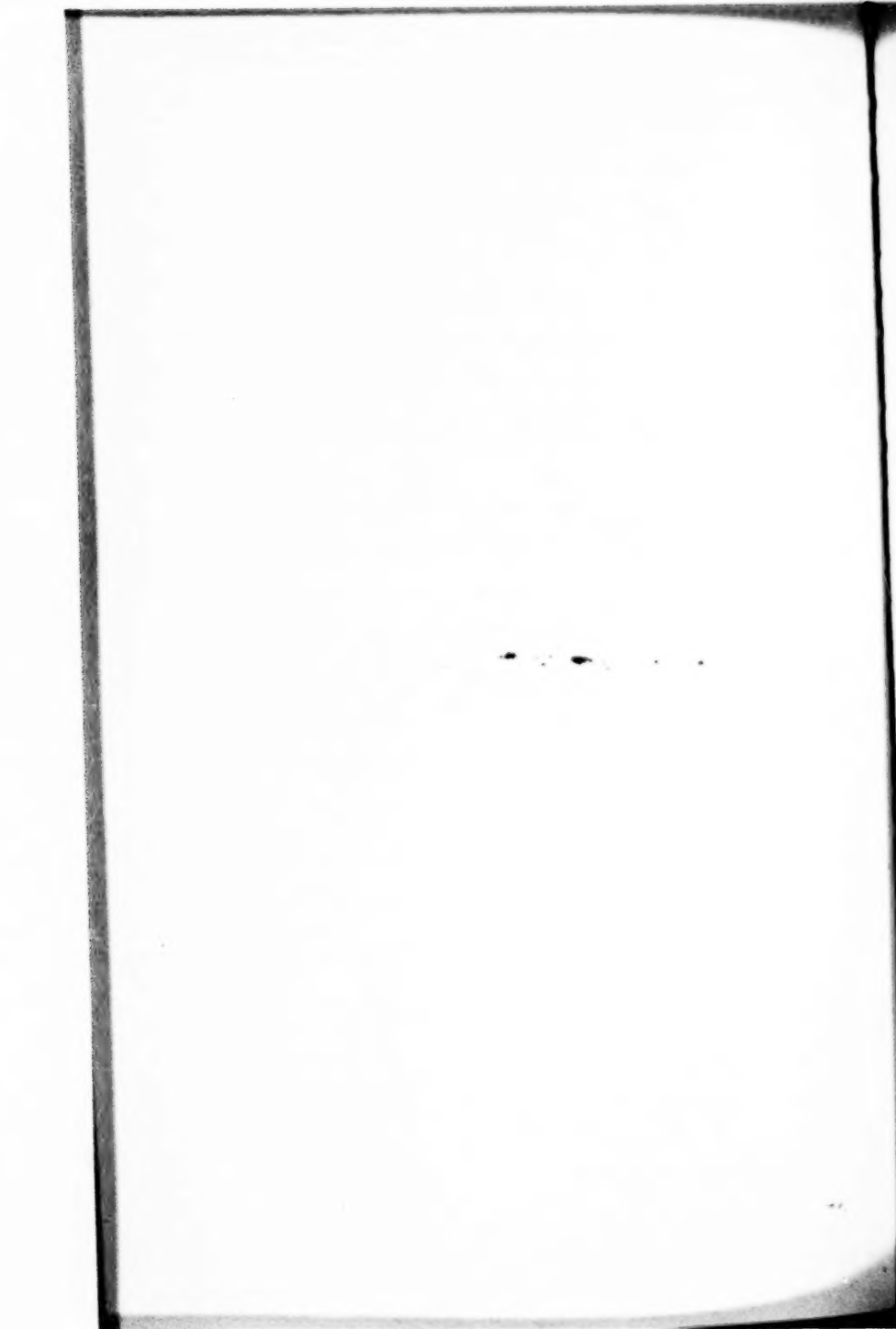
vs.

THE STATE OF WISCONSIN,  
*Defendant in Error.*

No. 76.

**BRIEF FOR PLAINTIFF  
IN ERROR.**

**GEORGE LINES,  
SAM T. SWANSEN,**  
*Counsel for Plaintiff in Error.*



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# **n the United States Supreme Court**

**OCTOBER TERM, 1927**

**THE NORTHWESTERN MUTUAL  
LIFE INSURANCE COMPANY,**  
*Plaintiff in Error,*

**vs.**

**No. 75**

**THE STATE OF WISCONSIN,**  
*Defendant in Error.*

**THE NORTHWESTERN MUTUAL  
LIFE INSURANCE COMPANY,**  
*Plaintiff in Error,*

**vs.**

**No. 76**

**THE STATE OF WISCONSIN,**  
*Defendant in Error.*

## **BRIEF FOR PLAINTIFF IN ERROR**

Plaintiff in error is a Wisconsin life insurance company doing business in that and other states upon the mutual or participating level premium plan.

In these cases, brought under subdivision (2) of Section 637, Wisconsin Statutes 1923, (Appendix p. 75), plaintiff in error seeks to recover sums paid under protest by it to defendant in error, it being claimed that the sums paid were

illegally exacted because the taxes were imposed upon interest received by plaintiff in error on Liberty and other Bonds issued by the United States. The amount claimed in Case No. 75 is \$236,515.14 (R. 21) paid January 10, 1924, as taxes on the income of plaintiff in error for the years 1918 to 1922, both inclusive (R. 20, 22-29). The amount claimed in Case No. 76 is \$57,743.64 (R. 19, 20) paid February 28, 1924, as taxes upon income for the year 1923.

The two cases were argued together in the State Supreme Court, decided on the same day and the records of the cases filed in this Court on the same day. Opinion in Case No. 75 is reported in 189 Wis. 103, and memorandum opinion in companion case No. 76 is reported in 189 Wis. 114.

The judgments sought to be reviewed were entered in the Circuit Court for Dane County, Wisconsin, June 17, 1925, (R. 36), and affirmed by the Supreme Court of Wisconsin February 9, 1926, (R. 37); writs of error were filed April 23, 1926, (R. 2), and the cases docketed and records filed in this Court June 2, 1926, (R. 50).

As the legal principles involved in the two cases are identical, and the complaints and records are essentially the same, differing only in details, one brief will be sufficient. Unless otherwise indicated, references herein are to the record in Case No. 75.

#### **SPECIFIC CLAIMS ADVANCED AND RULINGS MADE IN THE LOWER COURT WHICH ARE RELIED UPON AS THE BASIS OF THIS COURT'S JURISDICTION**

Section 76.34 of the Wisconsin Statutes for 1923 (Appendix p. 75) provides that no life insurance company shall do business in the state until licensed. In order to obtain a license a domestic company must pay into the state treasury "three per centum of its gross income from all sources for the year ending December thirty first, next prior to said first day of March, excepting therefrom income from rents of real estate upon which said company . . . has paid the taxes assessed thereon, and excepting also premiums collected on policies of insurance and contracts for annuities." "The payment of such license fee shall be in lieu of all taxes for any purpose authorized by the laws of this state, except

axes on such real estate as may be owned by such company." (R. 17).

The State Supreme Court held that the State could lawfully collect, as a part of the license fee or tax, 3% of the gross interest received by plaintiff in error from bonds and securities issued by the United States, thereby increasing the amount of tax correspondingly; that this did not impair the credit of the Government or impose burdens upon the United States, or any of its agencies or instrumentalities employed in carrying out its sovereign powers; that it did not violate Article I, section 8, subdivisions 2 and 18, of the Constitution of the United States, did not deprive plaintiff in error of property without due process of law, and did not deny to it equal protection of the laws, contrary to the Fourteenth Amendment; (R. 41-45); that the case was ruled by *N. W. Mutual Life Insurance Company vs. Wisconsin*, 247 U. S. 332; *U. S. Express Company vs. Minnesota*, 223 U. S. 335; *Cudahy Packing Company vs. Minnesota*, 246 U. S. 450, (R. 41), *State Tax on Railway Gross Receipts*, 15 Wall. 284, (R. 42 & 43), and *Flint vs. Stone Tracy Company*, 220 U. S. 107, (R. 44 & 45).

The State Supreme Court held further (although not discussed in the opinion) that the State could impose this tax or license fee notwithstanding the provisions of the several Acts of Congress, more particularly the Liberty Loan Acts which provide that Government bonds and securities "shall be exempt, both as to principal and interest, from all taxation now or hereafter imposed by the United States, any State, or any of the possessions of the United States, or by any local taxing authority except (a) estate or inheritance taxes, and (b) graduated additional income taxes, commonly known as surtaxes, and excess profits and war profits taxes, now or hereafter imposed by the United States, upon the income or profits of individuals, partnerships, associations, or corporations." (R. 39).

The jurisdiction of this Court is invoked under subdivision (a) of Section 237 of the Judicial Code, and the following cases it is believed sustain such jurisdiction:

*Truax v. Corrigan*, 257 U. S. 312, 324-5;

General Oil Co. v. Crain, Inspector, 209 U. S. 211, 220, 221, 224-8;

Dickinson v. Stiles, 246 U. S. 631;

Standard Oil Co. v. Graves, 249 U. S. 389, 394;

St. Louis Cotton Press Co. v. Arkansas, 260 U. S. 346;

Bluefield W. W. & L. Co. v. Public Service Commission, 262 U. S. 679, 683, 689;

Frick v. Pennsylvania, 268 U. S. 473;

N. W. Mutual Life Ins. Co. v. Wisconsin, 247 U. S. 132;

First National Bank v. Anderson, 269 U. S. 341, 345-6;

First National Bank v. Hartford, 47 S. C. R. 462 (Decided March 21, 1927).

#### STATEMENT OF THE CASE.

Case No. 75 seeks to recover additional taxes paid for the license years 1919 to 1923 inclusive, based on gross income for the calendar years 1918 to 1922 inclusive, and resulted because the Company was compelled to pay a tax of 3% of the gross interest received from the Government bonds and securities listed below. The complaint alleges that plaintiff in error does business in forty three states and in the District of Columbia; that it operates on the mutual or participating level premium plan. To meet and perform its policy obligations it owns large reserves, the minimum of which is fixed by the laws of Wisconsin and other states wherein it operates. Reserves are not segregated or specially allocated to any part of the assets, nor are they ear marked or separately invested. The laws of Wisconsin, during the years aforesaid, have specified the securities in which plaintiff in error may invest, among which authorized investments are bonds issued by the United States (R. 13 & 14).

For the license years 1919 to 1923 inclusive, plaintiff in error paid to the State all taxes or license fees chargeable against it, according to its understanding of the law, based upon gross income received for the respective calendar years 1918 to 1922 inclusive. During those years the Company

owned United States bonds and securities, and received as interest thereon amounts as follows:

	1918	1919	1920	1921	1922
U. S. A. Iss. of 1925	\$	\$	\$	\$	\$
1st Liberty Loan 3 $\frac{1}{2}$ %	26,250.00	26,250.00	26,250.00	26,250.00	7,524.33
2nd Liberty Loan 4%	49,647.83				
Second Liberty Loan 4 $\frac{1}{2}$ % (Converted)	61,973.27	128,775.00	131,548.96	171,275.00	191,285.37
3rd Liberty Loan 4 $\frac{1}{2}$ %	39,849.42	129,859.93	740,751.20	871,250.00	847,898.60
4th Liberty Loan 4 $\frac{1}{2}$ %		385,068.49	428,129.29	499,375.00	499,375.00
Victory Liberty Loan 4 $\frac{1}{2}$ %		148,659.81	447,647.91	447,891.96	17,945.91
U. S. A. Tres. Certs. of In- debtedness		100,720.28	226,092.82	86,329.33	113,083.93
U. S. A. Treasury Notes					66,183.95
Paid for Accrued Interest					175.14
	\$177,720.52	\$919,234.11	\$2,004,420.18	\$2,101,304.62	\$1,743,180.95

(R 14 & 15).

Plaintiff in error made due returns to the Commissioner of Insurance each year, showing gross income for the preceding calendar year, and paid the tax of 3% thereon. These statements showed also the interest received from the United States bonds, but the interest from them was not included in taxable income, on the theory that such interest was tax-free. These statements were accepted by the Commissioner and by the State Treasurer (R. 18, 22-29).

In October 1923 the Commissioner made written demand upon plaintiff in error to pay forthwith into the State treasury additional taxes or license fees for the years 1919 to 1923 inclusive, equal to 3% of the gross interest received during the calendar years 1918 to 1922 inclusive, from the federal tax-free bonds described above, with interest on the several amounts at 6% from March first of the year when the tax or fee should have been paid according to the demand. The demand was repeated in January 1924, and threat made that unless the taxes were paid the Commissioner would cancel and revoke the Company's license to do business. To protect its license plaintiff in error was compelled to pay and did pay under protest on January 10, 1924, as additional taxes or license fees for each of said license years 3% of the gross interest received upon the above bonds, amounting to \$208,468.80, with interest amounting to \$28,046.34; total, \$236,515.14. This sum was immediately deposited in the State Treasury, and the Treasurer issued and delivered his official receipt therefor. (R. 19, 29-34). For this amount judgment was demanded, with interest and costs. (R. 21).

Case No. 76 involved a like tax for the year beginning March 1, 1924, and ending March 1, 1925, based on gross income for the calendar year 1923. During 1923 the Company's gross income from United States bonds of the character described above (except U. S. A. 4s of 1925) was \$1,924,787.99; and 3% thereof amounted to \$57,743.64. (No. 76, R. 20, 22, 23). Payment of the taxes under coercion and protest is alleged in the complaint. (No. 76, R. 17, 18), and judgment demanded for the tax, with interest and costs. (No. 76, R. 19).

## SPECIFICATION OF ERRORS RELIED UPON.

1. The Supreme Court of Wisconsin erred in affirming the judgments of the Circuit Court of Dane County in favor of the defendant in error against the plaintiff in error, and dismissing the complaints on the merits. (R. 36, 37).

2. The Supreme Court of Wisconsin erred in holding and deciding that Section 76.34, Wisconsin Statutes 1921, (numbered Sec. 1211.35, Wis. Stats. 1919, and Sec. 51.32, Wis. Stats. 1917), which impose upon plaintiff in error a tax of 3% of its gross income from all sources (except from premiums and real estate upon which taxes had been paid), in so far as such gross income was received from bonds and securities issued by the United States, did not constitute or create a burden upon and interference with the power of Congress to borrow money upon the credit of the United States, and did not contravene the provisions of Article I, Section 8, of the Constitution of the United States.

3. The Supreme Court of Wisconsin erred in holding and deciding that the 3% tax levied and imposed by the State of Wisconsin upon the gross interest received by plaintiff in error on bonds and securities issued by the United States amounting during the calendar years 1918 to 1922 inclusive, to the aggregate sum of \$6,948,960.38 (received \$177,720.52 in 1918; \$919,334.11 in 1919; \$2,004,420.18 in 1920; \$2,104,304.62 in 1921; and \$1,743,180.95 in 1922), resulting in an aggregate tax of \$208,468.80, was not a burden upon and interference with the power of Congress to borrow money upon the credit of the United States, and did not contravene the provisions of the Act of Congress approved January 14, 1875, entitled "An Act to Provide for the Resumption of Specie Payments," (18 U. S. Stats. at Large, p. 296), (Appendix p. 77), and the Act of Congress approved July 14, 1870, entitled "An Act to Authorize the Refunding of the National Debt," (16 U. S. Stats. at Large, p. 272), (Appendix p. 76); the Act of Congress approved April 24, 1917, known as the "First Liberty Bond Act," (U. S. Stats. 1917, p. 35) (Appendix p. 77); the Act of Congress approved September 24, 1917, known as the "Second Liberty Bond Act," (U. S. Stats. 1917, p. 288) (Appendix p. 78), as amended by the Act of Congress approved April 4, 1918,

known as the "Third Liberty Bond Act," (U. S. Stats. 1917 & 1918, Part 1, p. 502); the Act of Congress approved July 9, 1918, known as the "Fourth Liberty Bond Act," (U. S. Stats. 1917 & 1918, Part 1, p. 844); The Act of Congress approved March 3, 1919, known as the "Victory Liberty Loan Act," (U. S. Stats. 1919, Part 1, p. 1309) (Appendix p. 79); and Section 3701, U. S. R. Stats. (Appendix p. 82).

4. The Supreme Court of the State of Wisconsin erred in holding and deciding that the 3% tax levied and imposed by the State of Wisconsin upon the gross interest received by plaintiff in error on bonds and securities issued by the United States, amounting during the calendar year 1923 to the aggregate sum of \$1,924,787.99, resulting in a tax thereon of \$57,743.64, was not a burden upon and interference with the power of Congress to borrow money upon the credit of the United States, and did not contravene the provisions of Article I, Section 8, of the Constitution of the United States. (No. 76, R. 20, 22, 23)

5. The Supreme Court of Wisconsin erred in holding and deciding that the 3% tax levied and imposed by the State of Wisconsin upon the gross interest received by plaintiff in error on bonds and securities issued by the United States amounting during the calendar year 1923 to the sum of \$1,924,787.99, resulting in a tax of \$57,743.64, was not a burden upon and interference with the power of Congress to borrow money upon the credit of the United States, and did not contravene the provisions of the Act of Congress approved April 24, 1917, known as the "First Liberty Bond Act," (U. S. Stats. 1917, p. 35) (Appendix p. 77); the Act of Congress approved September 24, 1917, known as the "Second Liberty Bond Act," (U. S. Stats. 1917, p. 288) (Appendix p. 78); as amended by the Act of Congress approved April 4, 1918, known as the "Third Liberty Bond Act," (U. S. Stats. 1917 & 1918, Part 1, p. 502); the Act of Congress approved July 9, 1918, known as the "Fourth Liberty Bond Act," (U. S. Stats. 1917 & 1918, Part 1, p. 844); the Act of Congress approved March 3, 1919, known as the "Victory Liberty Loan Act," (U. S. Stats. 1919, Part 1, p. 1309) (Appendix p. 79); and Section 3701, U. S. R. Stats. (Appendix p. 82).

## SUMMARY OF ARGUMENT.

The State of Wisconsin cannot by tax or otherwise impose a burden upon the United States or any of its agencies or instrumentalities used in carrying out its constitutional powers. (Art. I, Sec. 8, U. S. Constitution, Subdivisions (2) and (18). (Appendix p. 84).

*McCulloch v. Maryland*, 4 Wheat. 316;

*Weston v. Charleston*, 2 Pet. 449;

*Jaybird Mining Co. v. Weir*, 271 U. S. 609, 613; ———

*Dobbins v. Commissioners*, 16 Pet. 435;

*Collector v. Day*, 11 Wall. 113;

*United States v. Railroad Co.*, 17 Wall. 322, 327;

*Challam County v. United States*, 263 U. S. 341;

*In re De La Vergne Machine Co.*, 207 N. Y. S. 680.

SECTION 76.34, WISCONSIN STATUTES FOR 1923  
(Appendix, p. 75) IMPOSES A TAX, BECAUSE,

(a) It has been so held

*N. W. Mutual Life Ins. Co. v. State*, 163 Wis. 484;

*N. W. Mutual Life Ins. Co. v. Wisconsin*, 247 U. S. 132

(b) It is in lieu of all taxes on property except real estate;

*N. W. Mutual Life Ins. Co. v. State*, 163 Wis. 484;

*McHenry v. Alford*, 168 U. S. 651;

*United States Express Co. v. Minnesota*, 223 U. S. 335;

*Home Savings Bank v. Des Moines*, 205 U. S. 503;

*Atlantic Coast Line R. R. Co. v. Daughton*, 262 U. S. 413;

*Bank of Kentucky v. Commonwealth*, 9 Bush. 46;

*State v. United States Express Co.*, 114 Minn. 346;

Affirmed, 223 U. S. 335;

*State v. N. W. Telephone Exchange Co.*, 107 Minn. 399;

*Cudahy Packing Co. v. Minnesota*, 246 U. S. 450;

*Pullman Co. v. Richardson*, State Treas., 185 Cal. 484;

*In re Skelton Lead & Zinc Co.'s Gross Production Tax for 1919*, 81 Okla. 134;

*Protest of Bendelari, Gross Production Tax 1919*, 82 Okla. 97;

Large Oil Co. v. Howard, 63 Okla. 143;  
 Bank Tax Case, 69 U. S. 200;  
 Barnes, Sheriff, v. Jones, 139 Miss. 675.

(c) It is a revenue measure, and authority for its passage rests upon the taxing power and not the police power:

4 Cooley on Taxation (4th Ed.), Sec. 1784;  
 Knowlton v. Rock County, 9 Wis. 410;  
 State ex rel. v. Winnebago, etc., Plankroad Co., 11 Wis. 35;  
 State v. Railway Cos., 128 Wis. 449;  
 State v. C. & N. W. Ry. Co., 132 Wis. 345;

(d) It is immaterial what a revenue measure is called, — tax, license fee or excise. — If it operates to impose a burden upon instrumentalities of the United States or upon the constitutional right of Congress to borrow money, it is void. A state cannot enlarge its powers of taxation by changing the form of the tax or giving it another name:

Home Ins. Co. v. New York, 134 U. S. 504;  
 Pollock v. Farmers Loan & Trust Co., 157 U. S. 429;  
 International Paper Co. v. Massachusetts, 246 U. S. 135;  
 Western Union Telegraph Co. v. Kansas, 216 U. S. 1;  
 Postal Telegraph Cable Co. v. Adams, 155 U. S. 688;  
 Case of the State Freight Tax, 15 Wall. 232;  
 Delaware, Lackawanna & Western R. R. Co. v. Pennsylvania, 198 U. S. 341;  
 Com. v. Hamilton Mfg. Co., 12 Allen 298;  
 Home Savings Bank v. Des Moines, 205 U. S. 503;  
 Iowa Loan & Trust Co. v. Fairweather, 252 Fed. 605;  
 Fairbank v. United States, 181 U. S. 283;  
 Choctaw, Oklahoma & Gulf Ry. Co. v. Harrison, 235 U. S. 292;  
 Galveston, Harrisburg & San Antonio Ry. Co. v. Texas, 210 U. S. 217;  
 Underwood Typewriter Co. v. Chamberlain, 234 U. S. 113;  
 Leoney v. Crane Co., 245 U. S. 178.

A state revenue law, whatever its form, is *pro tanto* void if it reaches United States bonds in such a way that their

value or the income from them directly increases the tax or sum taken by the state under its taxing power. This Court is the final authority to decide if such revenue laws do in fact offend in this respect;

Bank of Commerce v. Commissioners, 67 U. S. 620, 631;  
Bank Tax Case, 69 U. S. 200, 208;

Home Savings Bank v. Des Moines, 205 U. S. 503, 509,  
513, 515;

Choctaw, Oklahoma & Gulf Ry. Co. v. Harrison, 235  
U. S. 292, 298 & 9;

Indian Territory Illuminating Oil Co. v. Oklahoma,  
240 U. S. 522, 530;

Large Oil Co. v. Howard, 63 Okla. 143;

Large Oil Co. v. Howard, 248 U. S. 549;

Gillespie v. Oklahoma, 257 U. S. 501, 505;

Farmers & Mechanics Savings Bank v. Minnesota, 232  
U. S. 516, 528;

Osborn v. Bank of the United States, 9 Wheat. 738, 862;

Weston v. Charleston, 2 Pet. 449, 466, 468;

Bank of Kentucky v. Commonwealth, 9 Bush. 46;

Railroad Co. v. Jackson, 7 Wall. 262;

State laws which burden interstate commerce bear some analogy to state laws that interfere with the federal power to borrow money, though as to the former the states have broader powers. The criterion of interference with interstate commerce is one of degree, because states, in order to exist, must have the right to tax interstate carriers; but they have no right to tax or burden instruments of the Government.

Gillespie v. Oklahoma, 257 U. S. 501, 505.

A state revenue act does, as a matter of law, burden and regulate interstate commerce if the tax:

(a) Is measured by gross receipts from interstate commerce;

Galveston, Harrisburg & San Antonio Ry. Co. v. Texas,  
210 U. S. 217, 227;

Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 295;

Ratterman v. Western Union Tel. Co., 127 U. S. 411;

Cook v. Pennsylvania, 97 U. S. 556;

Meyer v. Wells, Fargo & Co., 223 U. S. 298;

Philadelphia & So. S. S. Co. v. Pennsylvania, 122 U. S. 326;

Rowman v. Continental Oil Co., 256 U. S. 642.

(b) Or, is upon gross capital employed in interstate commerce;

Western Union Tel. Co. v. Kansas, 216 U. S. 1;

Pullman Co. v. Kansas, 216 U. S. 56;

International Paper Co. v. Massachusetts, 246 U. S. 135, 141-145;

Looney, Atty. Gen. v. Crane Co., 245 U. S. 178;

Locomobile Co. v. Massachusetts, 246 U. S. 146;

Air Way Electric Appliance Corp. v. Day, 266 U. S. 71;

Norfolk & Western Ry. Co. v. Pennsylvania, 136 U. S. 114, 129;

Alpa Portland Cement Co. v. Massachusetts 268 U. S. 203, 216-19.

A state revenue act does not necessarily burden or regulate interstate commerce if

(a) It is based on such fair proportion of total capital, or assets or gross receipts as the business done or property or mileage owned in the state bears to total capital, business, property or mileage. Such laws are usually upheld as bona fide efforts to value and tax the carriers' property in the state, provided, always, the plan followed fairly measures the value of the property in the state;

U. S. Express Co. v. Minnesota, 223 U. S. 345, 347 & 8;

Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 25;

Pittsburgh, Cin., Chic. & St. L. Ry. Co. v. Backus, 154 U. S. 421;

S. Y. Lake Erie & W. R. R. Co. v. Pennsylvania, 158 U. S. 431, 439;

Western Union Tel. Co. v. Taggart, 163 U. S. 1;

Adams Express Co. v. Ohio State Auditor, 165 U. S. 194;

Maine v. Grand Trunk Ry. Co., 142 U. S. 217;

Western Union Tel. Co. v. Massachusetts, 125 U. S. 530;

- Cudahy Packing Co. v. Minnesota, 246 U. S. 452;  
 Shaffer v. Carter, 252 U. S. 37, 57;  
 Postal Telegraph Cable Co. v. Adams, 155 U. S. 688,  
 695;  
 St. Louis Southwestern Ry. Co. v. Arkansas, 235 U. S.  
 350;  
 Hump Hairpin Mfg. Co. v. Emerson, 258 U. S. 290, 294,  
 296;  
 State v. Pullman Co., 178 Wis. 240, 261-274;  
 N. W. Mut. Life Ins. Co. v. State, 163 Wis. 484;  
 N. W. Mut. Life Ins. Co. v. Wisconsin, 247 U. S. 132;  
 Wallace v. Hines, 253 U. S. 66;  
 Union Tank Line Co. v. Wright, 249 U. S. 275, 282.

(b) Or, the tax or license fee based on total capital is subject to a reasonable maximum limit;

- Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 87;  
 Kansas City, Ft. Scott & Memphis Ry. Co. v. Kansas,  
 240 U. S. 227, 233, 235;  
 Cheney Bros. Co. v. Massachusetts, 246 U. S. 147.

The manifest and substantial difference between a tax measured by gross receipts and one measured by net income, offers an easy and practical distinction between a burden that is direct and immediate and one that is indirect and incidental.

- U. S. Glue Co. v. Oak Creek, 247 U. S. 321;  
 Crew Levick Co. v. Pennsylvania, 245 U. S. 292;  
 Peck & Co. v. Lowe, 247 U. S. 165;  
 Texas Transport & Terminal Co. v. New Orleans, 264 U. S. 150.

Section 76.34 Wisconsin Statutes for 1923 (Appendix p. 75) imposes a direct and immediate burden upon the securities involved and upon the power of the United States to borrow money. The State takes \$3.00 for every \$100.00 of interest received, impairing the economic value of the bonds;

- Davis, Director Gen. of Railroads, v. Farmers Coopera-  
 tive Equity Co., 262 U. S. 312;  
 Minneapolis, St. P. & S. M. R. R. Co. v. R. R. Com-  
 mission, 183 Wis. 47.

The cases relied upon by the Supreme Court of Wisconsin when applied to the facts do not sustain its conclusion:

- N. W. Mut. Life Ins. Co. v. State*, 163 Wis. 484;
- N. W. Mut. Life Ins. Co. v. Wisconsin*, 247 U. S. 102;
- U. S. Express Co. v. Minnesota*, 223 U. S. 335;
- Cudahy Packing Co. v. Minnesota*, 246 U. S. 450;
- State Tax on Ry. Gross Receipts*, 15 Wall. 284;
- Flint v. Stone Tracy Co.*, 220 U. S. 107;
- Packard Motor Car Co. v. Detroit*, 232 Mich. 245;
- Farmers & Bankers Life Ins. Co. v. Anderson*, 117 Kans. 451;
- City of Waco v. Amicable Life Ins. Co. (Tex.)* 248 S. W. 332 (decided Feb. 28, 1923, not officially reported).

The State of Wisconsin on the ground that it is prescribing conditions of doing business or on any other ground can not impose upon plaintiff in error a condition which deprives it of rights enjoyed under the Federal Constitution and the laws passed by Congress, or which burdens the enjoyment of such rights. Federal laws are supreme, extend throughout the land, touching every individual therein. (U. S. Constitution, Art. VI.); (Appendix p. 84).

- Ex parte Siebold*, 100 U. S. 371;
- Northern Securities Co. v. United States*, 193 U. S. 197, 332-3;
- Newberry v. United States*, 256 U. S. 232, 281;
- Collector v. Day*, 11 Wall. 113, 124;
- Chinese Exclusion Case*, 130 U. S. 581, 604-5;
- In re Debs*, 158 U. S. 364, 378;
- McCulloch v. Maryland*, 4 Wheat. 316, 424;
- Cohens v. Virginia*, 6 Wheat. 264, 414;
- 4 Ency. U. S. Sup. Ct. Rep., p. 213 (ccc), and Note 25;
- 4 Ency. U. S. Sup. Ct. Rep., p. 188 (Obbe), and Note 27;
- 29 Am. & Eng. Ency. of Law (2nd Ed.), p. 148;
- Weston v. Charleston*, 2 Pet. 449, 467;
- Legal Tender Cases*, 12 Wall. 457; 554, 565;
- 1 Rose's Notes, p. 1111;
- Second Legal Tender Case*, 100 U. S. 421, 448;
- Breitenbach v. Turner*, 18 Wis. 140;
- Thayer v. Hedges*, 23 Ind. 141;
- Brown v. Welch*, 26 Ind. 116;

- Hague v. Powers, 25 How. Pr. 17;  
 Reynolds v. Bank of Indiana, 18 Ind. 467, 469;  
 Tennessee v. Davis, 100 U. S. 257, 263;  
 Commonwealth v. Knox, 6 Mass. 76;  
 Osborn v. Bank, 9 Wheat. 738.

A condition that plaintiff must either pay taxes on gross interest from Government bonds, or cease doing business in the state, is unlawful and void, because it deprives plaintiff of rights conferred by the United States Constitution:

- Terral v. Burke Construction Co., 257 U. S. 529;  
 Tyler v. Dane County, 289 Fed. 843;  
 Estate of Shepherd, 184 Wis. 88.

The United States can lawfully control the states on the subject of taxing its bonds and other instrumentalities. It has in express language denied to the State of Wisconsin the right to impose the particular tax plaintiff was compelled to pay. (U. S. Constitution, Art. I, Sec. 8; (Appendix p. 347; See, 3701, R. S. U. S.; (Appendix p. 82);

Act of Jan. 14, 1875, (18 U. S. Stats. at Large, p. 296);  
 (Appendix, p. 77);

Act of July 14, 1870, (16 U. S. Stats. at Large, p. 272);  
 (Appendix, p. 76);

Act of April 24, 1917, (U. S. Stats. 1917, p. 35);  
 (Appendix, p. 77);

Act of Sept. 24, 1917 (U. S. Stats. 1917, p. 288;  
 (Appendix, p. 78);

As amended (U. S. Stats. 1917 & 1918, Part 1, p. 502);

Act of March 3, 1919 (U. S. Stats. 1919, Part 1, p. 1309);  
 (Appendix, p. 79).

Miller v. Milwaukee, 272 U. S. 713, 716;

McCulloch v. Maryland, 4 Wheat. 316, 421, 425;

Home Savings Bank v. Des Moines, 205 U. S. 503, 509,  
 513;

Smith v. Kansas City Title & Trust Co., 255 U. S. 180,  
 212, 213;

**Federal Land Bank of New Orleans v. Crosland**, 261 U. S. 374, 377, 378;

**Grether v. Wright**, 75 Fed. 742, 753, (6th Cir.);

**Fidelity & Deposit Co. v. Pennsylvania**, 240 U. S. 319, 323;

**Succession of Geier (La.)**, 99 So. 26; 155 La. 167;

**Bank v. Supervisors**, 7 Wall. 26, 30;

The several states can tax national banks to the extent and in the manner permitted by Congress; and not otherwise.

**First National Bank v. Anderson**, 269 U. S. 341, 347;

**McClulloch v. Maryland**, 4 Wheat. 316;

**Osborn v. Bank of the United States**, 9 Wheat. 738;

**Davis v. Elmira Savings Bank**, 161 U. S. 283;

**Owensboro Natl. Bank v. Owensboro**, 173 U. S. 664, 667;

**Van Allen v. The Assessors**, 70 U. S. 573, 581;

**People v. Commissioners**, 94 U. S. 415, 418;

**First Natl. Bank v. Adams**, 258 U. S. 362, 364, 365;

**San Francisco Natl. Bank v. Dodge**, 197 U. S. 70;

**Bank of California v. Richardson**, 248 U. S. 476;

**Pelton v. National Bank**, 191 U. S. 143;

**Evansville Bank v. Britton**, 105 U. S. 322;

**Merchants Natl. Bank v. Richmond**, 256 U. S. 635;

**Albany City Natl. Bank v. Maher**, 6 Fed. 417;

**First Natl. Bank v. Treasurer**, 25 Fed. 749;

**First Natl. Bank of Richmond v. Richmond**, 39 Fed. 309;

**First Natl. Bank v. Hartford**, 47 S. C. R. 462 (decided March 21, 1927).

In protection of its power to regulate commerce among the states, Congress may control state action as to intrastate transactions of interstate carriers. Its power extends to every instrumentality or agency by which such commerce is carried on.

**Houston & Texas Ry. Co. v. United States**, 234 U. S. 342, 351, 353;

**Wisconsin R. R. Com. v. C. R. & Q. Ry. Co.**, 257 U. S. 563, 589 & 590;

**Minnesota Rate Cases**, 230 U. S. 352, 398-400, 432 & 3;

Minneapolis, St. P. & N. W. Ry. Co. v. R. R. Com.,  
183 Wis. 47, 63;

Fulgham v. Midland Valley Ry. Co., 167 Fed. 660;

Watson v. St. Louis, I. M. & S. Ry. Co., 169 Fed. 942;  
(affirmed 223 U. S. 745);

Addyston Pipe & Steel Co. v. United States, 175 U. S.  
211, 228;

Lottery Case, 188 U. S. 321;

Wilson v. New, 243 U. S. 332, 352;

Hoke v. United States, 227 U. S. 308;

United States v. Delaware & Hudson R. Co., 213 U. S.  
366;

United States v. Trans-Missouri Freight Assn., 166 U.  
S. 290.

The question presented is one of power to tax, not the amount of tax. The tax is not sustained by showing that the state could lawfully impose on plaintiff in error a tax equal to or greater than the amount collected;

Frick v. Pennsylvania, 268 U. S. 473, 494;

Fairbank v. United States, 181 U. S. 283; 291 & 2;

Owensboro Natl. Bank v. Owensboro, 173 U. S. 664,  
683;

Home Savings Bank v. Des Moines, 205 U. S. 503, 519;

First Natl. Bank v. Adams, 258 U. S. 362, 365;

Robbins v. Shelby County Taxing Dist., 120 U. S. 489,  
497.

#### ARGUMENT

*The State of Wisconsin cannot by tax or otherwise impose a burden upon the United States or any of its agencies or instrumentalities employed in carrying out its constitutional powers.*

Article I, Section 8, United States Constitution, provides: (Appendix, p. 84.)

"The Congress shall have power \* \* \* (2) to borrow money on the credit of the United States; \* \* \* (18) to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Gov-

ernment of the United States, or in any department of offices thereof."

These bonds are instrumentalities of the United States issued and sold directly to its citizens under the constitutional power to borrow money. That they and the interest arising from them are protected against any tax or burden imposed by the State of Wisconsin directly has been recognized since *McCulloch vs. Maryland*, 4 Wheat. 316. In that case a state statute provided that a bank not organized under its laws must issue notes on paper stamped with State stamps, or in lieu thereof pay the State \$5,000 annually. The United States Bank refused to pay the license fee, and continued to issue unstamped paper. Suit was brought to collect. It will be noted this was a *franchise tax* for the privilege of issuing commercial paper. The Bank was held to be an instrumentality of the Government, useful and perhaps necessary to carry out its fiscal operations; and although Congress had not expressly withheld from the states the right to tax the bank or its operations, yet there was no such power, upon the principle

" \* \* \* that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and can not be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are: 1. That a power to create implies a power to preserve. 2. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and to preserve. 3. That where this repugnancy exists, that authority which is supreme must control, not yield, to that over which it is supreme." (P. 426.)

Page 427. "It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so

necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the constitution."

Pages 429 and 430: "If we measure the power of taxation residing in a State, by the extent of sovereignty which the people of a single State possess, and can confer on its government, we have an intelligible standard applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a State unimpaired; which leaves to a State the command of all its resources, and which places beyond its reach all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give."

Page 433: "The question is, in truth, a question of supremacy; and if the right of the States to tax the means employed by the general government be conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation."

In *Wentworth v. Charleston*, 2 Pet. 449, p. 468:

"The right to tax the contract to any extent, when made, must operate upon the power to borrow before it

is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely."

*Jaybird Mining Co. v. Weir*, 271 U. S. 609, 613:

"It is elementary that the Federal government in all its activities is independent of state control. This rule is broadly applied. And, without congressional consent, no federal agency or instrumentality can be taxed by state authority. With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the State's inability to interfere has been regarded as established since *McCulloch v. Maryland*, 4 Wheat. 316."

A state cannot tax an officer of the United States, or his office or its emoluments.

*Dobbins v. Commissioners*, 16 Pet. 435.

Congress cannot tax the salary of a state judicial officer.

*Collector v. Day*, 11 Wall. 113.

See also—

*United States v. Railroad Co.*, 17 Wall. 322, 327.

A corporation whose stock is owned by the United States, organized to make war implements, is a government instrumentality. A tax on its property or a franchise tax based on net income taxes "the means employed by the Government" in executing its powers, and is void.

*Clallam County v. United States*, 263 U. S. 341;

*In re De La Vergne Machine Co.*, 207 N. Y. S. 680.

*Section 76.34, Wisconsin Statutes for 1923, imposes a tax* (Appendix, p. 75)

(a) We print at this point, for the convenience of the Court, so much of the State statutes as is pertinent to the issue;

## Section 76.34:

"Every company \* \* \* transacting the business of life insurance within this State \* \* \* shall, on or before the first day of March, in each year, pay into the state treasury as an annual license fee for transacting such business the amounts following:

(1) If such company \* \* \* is organized under the laws of this state, three per centum of its gross income from all sources for the year ending December thirty-first, next prior to said first day of March excepting therefrom income from rents of real estate upon which said company \* \* \* has paid the taxes assessed thereon, and excepting also premiums collected on policies of insurance and contracts for annuities."

(2) Foreign companies.

(3) "Such license, when granted, shall authorize the company \* \* \* to whom it is issued to transact business until the first day of March of the ensuing year, unless sooner revoked or forfeited. The payment of such license fee shall be in lieu of all taxes for any purpose authorized by the laws of this state, except taxes on such real estate as may be owned by such company. \* \* \*"

Section 70.11, exempts from property tax: (Appendix p. 83)

"(14) All the personal property of all insurance companies that now are or shall be organized or doing business in this state."

Section 71.05 exempts from income tax: (Appendix p. 83)

"(3) Income derived from property and privileges by persons now required by law to pay taxes or license fees directly into the treasury of the state in lieu of taxes, and such persons shall continue to pay taxes and license fees as heretofore."

Section 1947-5 (now Sec. 206.02 (10): (Appendix p. 83)

"No life insurance corporation whatever shall do any business in this state, nor shall any person act as agent or otherwise within this state in receiving or procuring applications for life insurance or in any manner aid in transacting such business for any such corporation until it shall have first procured a license from said commissioner authorizing it to issue policies of insurance in this state and have paid therefor the license fee required to be paid by section 76.34 \* \* \*."

Section 1948 (now Sec. 206.16) : (Appendix p. 84)

"No company shall transact business in this state until it shall have obtained a license therefore from the commissioner of insurance."

The Wisconsin Supreme Court in *Northwestern Mutual Life Insurance Co. vs. State*, 163 Wis. 484, held this law imposed a tax.

"It is clear that this so-called license fee is a privilege or occupation tax." (P. 489)

Affirming the decision, this Court said

"The tax in question is, therefore, not only one for the privilege of doing life insurance business within the State, but is, in effect, a commutation tax levied by the State in place of all other taxation upon the personal property of the Company in the State of Wisconsin." (247 U. S. 132, 137) (Italics ours).

(b) It is "in lieu of all taxes for any purpose authorized by the laws of this state," except real estate taxes. Plaintiff's personal property is exempt from property tax, and its income from income tax.

In *N. W. Mut. Life Ins. Co. vs. State, supra*, the State Court stressed the fact "that the license tax in question is levied in lieu of all other state taxes" (p. 491); that the company had vast reserve funds "invested in interest bearing securities" (p. 491); that "these securities are all credits, that is, personal property of an intangible character, the situs of which for the purposes of taxation is in this State at the residence of the corporation" (p. 492); that these securities and credits taxable in Wisconsin, "should, in justice to other taxpayers, contribute to the expenses of the

government which created and protects their owners" (p. 492); and an equitable tax *upon the property* could be fixed either by a license fee or by a tax upon the property itself (p. 493). The Court held the license fee equivalent to a tax on property.

*McHenry ex. Alford*, 168 U. S. 651. A North Dakota statute provided that "in lieu of any and all other taxes" railroads should pay "a percentage of all the gross earnings \* \* \* arising from the operation of such railroad as shall be situated within this Territory." This was held a property tax and not on "the gross earnings of the corporation *which arose from interstate commerce*" (p. 670).

Page 671: "When it is said, as it is in this act, that the tax collected by this method shall be in lieu of all other taxes whatever, it would seem that it might be claimed with great plausibility that a tax levied under such circumstances and by such methods was not in reality a tax upon the gross earnings, but was a tax upon the lands and other property of the company, and that the method adopted of arriving at the sum which the company should pay as taxes upon its property was by taking a percentage of its gross earnings."

*United States Express Co. ex. Minnesota*, 223 U. S. 335, 346. A Minnesota statute taxed express companies 6 per cent of gross receipts in lieu of all other taxes. Held a tax on the property of the Company located in the State, following the *McHenry Case*.

In *Haw. Savings Bank ex. Dea Maunac*, 205 U. S. 503, the statute required bank stock to be assessed to the bank and not to the stockholders, and "the property of such corporation shall not be otherwise assessed." This, said the Court (p. 512), "plainly implies that the assessment already provided for is in substance an assessment upon the property of the corporation."

To the same effect:

*Atlantic Coast Line R. R. Co. v. Daughton*, 262 U. S. 413, 419;

*Bank of Kentucky v. Commonwealth*, 9 Bush. 46, 47;

State v. United States Express Co., 114 Minn. 346,  
(Aff'd. 223 U. S. 335);

State v. N. W. Telephone Exchange Co., 107 Minn. 390;

Cudahy Packing Co. v. Minnesota, 246 U. S. 450;

Pullman Co. v. Richardson, State Treas., 185 Calif. 484;

In re Skelton Lead & Zinc Co.'s Gross Production Tax  
for 1919, 81 Okla. 134;

Protest of Bendelari Gross Production Tax 1919, 82  
Okla. 97;

Large Oil Co. v. Howard, 63 Okla. 143;

Bank Tax Case, 69 U. S. 200, 208;

Barnes, Sheriff, v. Jones, 139 Miss. 675.

Wisconsin may tax plaintiff's *taxable property*, but not these bonds; and as a tax on *property*, measured by gross income, receipts from these tax-exempt bonds must be excluded.

(c) The tax or license fee aims to produce revenue and is highly successful in that respect. The Annual Report of the Wisconsin Insurance Commissioner for 1924 (p. 8) (business of 123), shows that for the fiscal years ending June 30, 1919 to 1923, both inclusive, the receipts of the Insurance Department from fees (exclusive of State tax or State license fees) were more than \$300,000 in excess of the expenses of operating the Department. The figures are:

Year Ending June 30th	Receipts	Total Disbursements	Excess of Receipts over Disbursements
1919	\$ 82,152.20	\$44,880.22	\$ 37,271.98
1920	106,323.13	41,342.29	64,980.84
1921	114,888.44	44,076.20	70,812.24
1922	121,084.25	41,867.37	79,216.88
1923	125,552.77	39,044.49	86,508.28
			\$338,820.22

During the same period the Department collected from insurance companies operating in the State more than \$5,000,000 in State taxes or license fees, exclusive of the Fire Marshal tax and Fire Department dues. By years, the receipts were:

Year Ending June 30th	State Tax
1919 .....	\$ 853,317.28
1920 .....	914,405.88
1921 .....	1,057,786.22
1922 .....	1,125,136.04
1923 .....	1,261,532.64
	<hr/>
	\$5,212,178.06

(Appendix p. 86)

When the purpose of a law is to raise revenue, authority for its passage rests upon the taxing power rather than the police power. (4 Cooley on Taxation (4th Ed.) (Sec. 1784).

*Knudtson v. Rock County*, 9 Wis. 410, 418:

"Taxes \* \* \* are burdens or charges imposed by the legislative power of a state upon persons or property for public uses."

The theory of our Government is "that the burdens of supporting the government should be borne equally by all the individuals composing it, in proportion to the benefits conferred, and that the taxpayer receives for the money exacted, a just compensation by the protection afforded his person and property by the proper application of the tax." (P. 419).

*State ex rel. v. Winnebago, etc., Plankroad Co.*, 11 Wis. 45. A statute requiring a plankroad company to pay to the State for its use "a sum equal to one per centum of the gross earnings \* \* \* which amount of tax shall take the place and be in full of all the taxes"—not specifically stated to be a license fee,—was held a tax upon the property of the company, within the constitutional provision that "taxation shall be uniform." (Wis. Const., Art. 8, Sec. 1).

Page 44. "It does not perform the functions of a license. A license is an authority granted to do that which the licensee might not legally do without it. And although the payment of money is frequently required for the license, yet its primary object is usually that

of a police regulation, and not directly to raise a revenue." (Italics ours).

Some years ago Wisconsin railroads paid taxes by obtaining "license to operate", paying as a "license fee" a percentage of gross receipts within the State. (Wis. Stats. 1898, Secs. 1211 to 1214). The sections imposing these license fees were part of the chapter that taxed or licensed life insurance companies (Chap. 51). Railroad license fees have always been held to be taxes levied under the taxing power.

In *State v. Railway Co.*, 128 Wis. 449, the Court agreed unanimously that this license fee was a tax. While the majority thought it not within the constitutional rule of uniformity, yet "the term 'tax' has come to be applied to all sorts of exactions which swell the public funds" (pp. 484, 485); that as the legislature must prescribe the property to be taxed and the property to be exempt, it may exempt railroad property and "exact an equivalent therefor." (Pp. 489 to 492). "It is a special form of taxation; of raising revenue, and so, properly speaking, means the exercise of taxing power." (P. 509).

In a concurring opinion, Justice Dodge said:

"I look upon the imposition under these license fee statutes as 'taxation' in the sense of that word in sec. 1, art. VIII, of our constitution, and think the arguments and deductions to the contrary unwarranted by anything said by this court, fairly and judicially considered, or by anything in the history of the constitutional convention." (P. 518).

The latest case is *State vs. C. & N. W. Ry. Co.*, 132 Wis. 345,—an action to recover additional taxes.

Page 352: "In the case of *State vs. Railway Co.*, 128 Wis. 449, the nature of the obligation so imposed on railway companies was exhaustively treated and it was held to be an exaction imposed by the state under the taxing power. In its inception the state proceeds in the usual manner of imposing it as a burden on a privilege and franchise, which the defendant was required to assume as a condition precedent to exercising the privilege

thereby granted. It was said that these incidents to its imposition gave rise to features of a contractual nature, but it was declared that the obligation itself was clearly a tax imposed by the state under its taxing power for the purpose of raising revenue to meet expenses in administering the governmental affairs. . . . We shall treat the question as at rest, and assume for the purposes of this case that the state seeks to collect unpaid taxes due it from the defendant for the various years covered by the complaint."

(d) What a law imposes may be a tax though called something else. It matters not what this tax is called. If, in practical effect, it creates a burden upon bonds of the United States or their income, it is void. A State cannot enlarge its powers of taxation by changing the form of the tax or by calling it something else.

*Hume Ins. Co. vs. New York*, 134 U. S. 594, 598:

"Nor can this inhibition upon the States be evaded by any change in the mode or form of the taxation, provided the same result is effected—that is, an impediment is thereby interposed to the exercise of a power of the United States. That which cannot be accomplished directly cannot be accomplished indirectly. Through all such attempts the court will look to the end sought to be reached, and if that would trench upon a power of the government, the law creating it will be set aside or its enforcement restrained. Thus in *Henderson vs. Mayor of New York*, 92 U. S. 259, 268, a statute of New York provided that the master or owner of any vessel bringing passengers from foreign ports into the port of New York should give a bond in the sum of \$300 for each passenger landed, against his becoming a public charge for four years thereafter, or pay within twenty-four hours thereafter \$150 for each passenger, and that, if neither bond was given nor payment made, a penalty of \$500 for such failure would be incurred, which should be a lien upon the vessel. It was contended that the object of the requirement was not taxation but protection against pauperism, and therefore valid as within the police power. But the court said that in whatever

language the statute may be framed, its purpose must be determined by its reasonable and natural effect, and judged by that criterion the tax was either on the owners of the vessel for the right of landing passengers or upon the passengers themselves; and that, therefore, the statute was a regulation of commerce and void.

To the same purport is the familiar case of *Brown vs. Maryland*, 12 Wheat. 419, so often cited in this court, where it was contended that a license tax required of an importer to sell his goods, while held in bulk as imported, was a tax only upon his occupation. But the court observed that this was only changing the form without varying the substance of the tax, adding that "it is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself."

*Galveston, Harrisburg & San Antonio Co. vs. Texas*, 210 U. S. 217, 227:

"A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the States so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form. *Stockard v. Morgan*, 185 U. S. 27, 37; *Asbell v. Kansas*, 209 U. S. 251, 254, 256."

*Delaware, Lackawanna & Western R. R. Co. vs. Pennsylvania*, 198 U. S. 341, 357:

"Can the mere name of the tax alter its nature in such case? If so, the way is found for taxing property wholly beyond the jurisdiction of the taxing power by calling it a tax on the value of capital stock or something else, which represents that property."

*Postal Telegraph Cable Co. vs. Adams*, 155 U. S. 688, 698:

"The substance and not the shadow determines the validity of the exercise of the power."

This principle has been applied time and again.

*Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429, 581 and 583;

*International Paper Co. v. Massachusetts*, 246 U. S. 135, 141 to 142;

*Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 27-29, 37;

*Case of the State Freight Tax*, 15 Wall. 232, 272;

*Com. v. Hamilton Mfg. Co.*, 12 Allen (Mass.), 298, 301;

*Home Savings Bank v. Des Moines*, 205 U. S. 503, 515;

*Iowa Loan & Trust Co. v. Fairweather*, 252 Fed. 605, 608;

*Fairbank v. United States*, 181 U. S. 283, 296, 300;

*Choctaw, Oklahoma & Gulf Ry. Co. v. Harrison*, 235 U. S. 292, 298;

*Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113, 120;

*Looney v. Crane Co.*, 245 U. S. 178, 189-190.

**A STATE REVENUE LAW, WHATEVER ITS FORM, IS PRO TANTO VOID IF IT REACHES UNITED STATES BONDS IN SUCH A WAY THAT THEIR VALUE OR THE INCOME FROM THEM DIRECTLY INCREASES THE TAX OR SUM TAKEN BY THE STATE UNDER THE TAXING POWER.**

This Court is the final authority whether a State law operates in fact as a burden upon or hindrance to the Federal borrowing power. The subject has been a source of much litigation, so the rule of law has become well established, and except in a few border-line cases quite easy of application.

The opinions must be applied and limited to the specific question; and every law stands or falls as the court determines that it does or does not directly burden Government facilities.

*Bank of Commerce vs. Commissioners*, 67 U. S. (2 Black) 620. A New York statute (1857) provided the capital of a State bank should be "assessed at its actual value" and taxed as other property. (See 70 U. S. 579). The total capital

of plaintiff bank was some \$9,000,000, of which about \$400,000 was invested in real estate and the remainder in United States securities. The Commissioners deducted the value of real estate in making the assessment, but not the Government securities, on the theory the assessment was not upon the securities but upon Bank capital. Value of assets, it will be noted, directly affected the amount of tax. Some of the securities were issued before and some after the Act of 1862 (now Sec. 3701, U. S. R. S.) exempting obligations of the United States "from taxation by or under State, municipal or local authority." The State Court held the bonds issued after 1862 were exempt and should be deducted in valuing capital,—modifying the assessment to that extent,—but this Court held all the securities were exempt and should have been excluded. It was immaterial that the law did not tax the stock *en nominis*, and did not discriminate in favor of or against one owning United States securities. The tax was in fact upon the securities and "affected their value in the market, and the free and unrestrained exercise of the power" to borrow money. (P. 631.)

The law was then amended so the tax was "*on a valuation equal to the amount of their capital stock paid in or secured to be paid in, and their surplus earnings*." Again, value of assets increased the value of capital stock and so measured the tax. Did the amended law tax these securities? That question came before the Court in

Bank Tax Case, 69 U. S. 200, (2 Wall.)

The State argued it was not a tax *on property*, but a franchise tax equal to what would be levied "*on a valuation equal to the amount*" of the capital stock; that reference to valuation of the stock and surplus was merely to fix the amount to be paid for the franchise; and, though the State could not tax United States bonds, it could compel banks which owned them to contribute to the State's finances the same as banks owning taxable bonds. The banks argued it was immaterial whether the tax on them was levied in respect to property, or on the property itself, because either way property was the standard and basis for the rate of taxation; the tax necessarily fell on the Government and affected the value of the securities; when the Government borrows money

subject to taxation, it receives as much less percentum from the lender as will equal, substantially, a capital sufficient to yield interest equal to the tax. That is, bonds which at par will pay 6% interest, without tax, will only be worth 66 cents if the lender must pay a tax of 2%. If the tax reaches 6%, it will exclude the Government from the market and annihilate its power to borrow money.

Court, p. 208:

"Now, when the capital of the banks is required or authorized by the law to be invested in stocks, and among others, in United States stock, under their charters or articles of association, and this capital thus invested is made the basis of taxation of the institutions, there is great difficulty in saying that it is not the stock thus constituting the corpus or body of the capital that is taxed. It is not easy to separate the property in which the capital is invested from the capital itself. It requires some refinement to separate the two thus intimately blended together. The capital is not an ideal, fictitious, arbitrary sum of money set down in the articles of association, but in the theory and practical operation of the system, is composed of substantial property, and which gives value and solidity to the stock of the institution. It is the foundation of its credit in the business community."

*Home Savings Bank vs. Des Moines*, 205 U. S. 503. A State statute provided that "*shares of stock of state and savings banks . . . shall be assessed to such banks . . . and not to the individual stockholders.*" To determine value of the shares the bank furnished a statement showing separately capital stock, surplus and undivided earnings. From this statement and other sources the assessor valued the shares, deducting the amount invested in real estate. The Home Savings Bank owned Government bonds, which the assessor included in valuing the shares. The Court held the Bank did not pay the tax as agent of the stockholders, but paid its own tax obligation. Value of the shares was adopted as a measure for valuing corporate property, and "*the fair interpretation of the law is that the taxes are upon the property of the banks.*" (Pp. 509-511.)

"The State cannot by any form of taxation impose any burden upon any part of the national public debt." (P. 513).

Page 515:

"The slight concealment afforded by the omission of the property *ex nomine* is not sufficient to disguise the fact that in effect it is the property which is taxed. If included in that property it is discovered that there is some which is entitled by Federal right to an immunity, it is the duty of this court to see that the immunity is respected."

*Choctaw, Oklahoma & Gulf Ry. Co. v. Harrison*, 235 U. S. 292. By a treaty between the United States and certain Indian tribes, Indian coal lands remained the common property of the members of the tribe, and the revenue was used to educate the children. The mines were supervised by two trustees appointed by the President and the royalties paid into the United States treasury. The trustees leased the mines to the Railway Company. A law of Oklahoma imposed a tax of 2% on the *gross receipts* from total coal production, in addition to the *ad valorem* tax on the mining property. The Court held the Railway Company was operating the mines, as a government instrumentality, carrying out the treaty obligation, and the *gross receipts tax* was a tax upon a government instrumentality. (Pp. 298 & 299).

*Indian Territory Illuminating Oil Co. vs. Oklahoma*, 240 U. S. 522, is like the one preceding. The Company had oil leases upon tribal lands, and was a Governmental instrumentality of like character. Oklahoma taxed the Company's property as a public service corporation. The State Court first held the tax was upon the leases as property, but later changed its ground and held it was upon the stock of the corporation, measuring its value by including the leases. The value of the leases, therefore, directly and necessarily affected the amount of tax. This Court held the tax void under either view, and after citing the *Harrison case*, said:

P. 530:

"A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to

*make them.* If they cannot be taxed as entities, they cannot be taxed vicariously by taxing the stock, whose only value is their value, or by taking the stock as an evidence or measure of their value, rather than by directly estimating them as the Board of Equalization and Referee did. The assessment by the Board was of the leases as objects of taxation, having no immunity under the Federal law. \* \* \* It follows from these views that the assessment against the Oil Company, so far as it included the leases, whether as separate objects of taxation or as represented or valued by the stock of the company, is invalid." (Italics ours).

*Large Oil Co. v. Howard*, 63 Okla. 143. The Oil Company was also operating upon Indian lands as a Government instrumentality. Oklahoma required it pay a sum equal to 3 per cent of the gross value of production, less royalties paid, "in full and in lieu of all taxes," state or municipal, upon the property employed in oil production and upon the oil produced. The State Court held this was not a privilege tax, but a property tax upon the annual product of the well; and though the State could not tax the operations of plaintiff, it could tax its property employed in a Government agency, relying upon the cases holding that a State can tax the property of an interstate carrier, although it cannot tax interstate commerce or the gross receipts of interstate commerce. On writ of error this Court reversed the decision without opinion, on authority of the *Harrison and Indian Territory H-laminating cases*. (*Large Oil Co. v. Howard*, 248 U. S. 549).

These Oklahoma cases were all re-affirmed in *Gillespie ex Oklahoma*, 257 U. S. 501. Gillespie was operating upon restricted Indian lands as a Government instrumentality. An Oklahoma law imposed a tax upon *net income* arising from all sources, and the Court held Gillespie could not be taxed on his net income derived from sales of his shares of the oil and gas received under these leases, because the leases were Government instrumentalities. The State argued that as the tax was upon *net income from all sources* it did not directly burden the Government instruments—relying upon cases holding a tax on net income where part of the gross income was from interstate commerce did not directly burden interstate commerce. But the Court made this distinction:

P. 505: "The criterion of interference by the States with interstate commerce is one of degree. It is well understood that a certain amount of reaction upon and interference with such commerce cannot be avoided if the States are to exist and make laws. (Citing cases). The rule as to instrumentalities of the United States on the other hand is absolute in form and at least stricter in substance. (Citing cases). 'A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them.' 240 U. S. 539. The step from this to the invalidity of the tax upon income from the leases is not long.

In cases where the principal is absolutely immune from interference an inquiry is allowed into the sources from which net income is derived and if a part of it comes from such a source the tax is *pro tanto* void." (Citing cases).

*Farmers & Mechanics Savings Bank vs. Minnesota*, 232 U. S. 516. Minnesota taxed as "credits" the surplus of mutual savings banks. Surplus was determined by deducting from assets (other than real estate assessed separately) the amount of deposits and other accounts payable. The State Court held this was a tax on the property of the Bank, and this Court accepted that construction. The Bank owned bonds issued by municipalities in Indian and Oklahoma Territories, and claimed these should be excluded from assets because they were not taxable by the State. This Court held Territories and municipalities therein were Congressional instrumentalities for local government so the states could not interfere with their operations by taxation or otherwise. Oklahoma in the meantime had acquired statehood and assumed payment of its bonds and those of its municipalities, and it was argued that these had become state bonds that could be taxed by Minnesota; but the Court said the exemption was not lost, because municipal credit was enhanced and the borrowing rendered more favorable because the bonds, as obligations of an agency of the Federal Government, were exempt from taxation by the states. The exemption increased their market value.

It was suggested further that the bonds were but a small

proportion of total assets, and as the tax was upon the surplus only after deducting liabilities, these bonds were not taxed. "But as the surplus is treated as property and taxed as such, it is obvious that *some portion of the burden of the tax is attributable to the ownership of the municipal bonds.*" (P. 528). (Italics ours).

*Osborne vs. Bank of the United States*, 9 Wheat. 738. The State of Ohio imposed an annual tax of \$50,000 on every bank not organized under its laws. Clearly an *excise or occupation tax*. In an action to enjoin collection the State attempted to distinguish between the *trade and business* of the Bank and its *public agency*, arguing that the State protected the Bank in its trade and business. Following the *McCulloch case*, the Supreme Court held the distinction was immaterial.

P. 862: "The distinction between destroying what is denominated the corporate franchise, and destroying its vivifying principle, is precisely as incapable of being maintained, as a distinction between the right to sentence a human being to death, and a right to sentence him to a total privation of sustenance during life. Deprive a bank of its trade and business, which is its sustenance, and its immortality, if it have that property, will be a very useless attribute.

This distinction, then, has no real existence. *To tax its facilities, its trade, and occupation, is to tax the bank itself.* To destroy or preserve the one, is to destroy or preserve the other." (Italics ours).

*Weston vs. City of Charleston*, 2 Pet. 449. A tax in the nature of an income tax, levied on net interest from United States stocks and bonds, is a tax on the stocks and bonds. "If the right to impose the tax exists, it is a right which in its nature acknowledges no limit." (P. 466).

P. 468: "The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract."

*Bank of Kentucky vs. Commonwealth*, 9 Bush. 46. A Kentucky statute taxed gross income from Government bonds. The State argued the tax was not on the bonds, but on the interest after it had become property. Court (p. 47):

"To tax this interest as it annually or semi-annually becomes due and payable is in effect to tax the *debt* of the Government, or, in other words, to tax the instrument or means used by it in the execution of its expressly delegated power 'to borrow money on the credit of the United States.' "

*Railroad Co. vs. Jackson*, 7 Wall. 262. A tax on interest payable on bonds is a tax on the security.

These authorities do not conflict with the line of cases holding that *shares* in banks or other corporations may be taxed to the *stockholders* at full value without deduction on account of tax exempt securities *owned by the corporation*. The stockholder does not own the corporate assets. Capital stock is property distinct and independent from corporate assets, and to tax the stockholder is not to tax the corporation.

*Van Allen v. Assessors*, 70 U. S. 573;

*Hawley v. Malden*, 232 U. S. 1;

*Home Savings Bank v. Des Moines*, 205 U. S. 503, 518, 519;

*Des Moines Natl. Bank v. Fairweather*, 263 U. S. 103;

*Natl. Bank of Commerce v. Allen*, (8th Cir.), 223 Fed. 472, 475.

ANY FORM OF REVENUE MEASURE, WHICH IN OPERATION TAXES DIRECTLY (a) GROSS RECEIPTS FROM INTERSTATE COMMERCE, OR (b) GROSS CAPITAL EMPLOYED, IS A REGULATION OF AND BURDEN UPON THE COMMERCE AND VOID UNDER THE COMMERCE CLAUSE OF THE CONSTITUTION. (Art. I, Sec. VIII (3).)

The analogy between revenue laws that burden and regulate interstate commerce and laws that impede the Government in the exercise of its power to borrow money is not complete; because "the criterion of interference by the States with interstate commerce is one of degree," and "a certain amount of reaction upon and interference with such commerce cannot be avoided if the States are to exist and make laws," whereas "the rule as to instrumentalities of the

United States on the other hand is absolute in form and at least stricter in substance." (257 U. S. 505). Notwithstanding this difference, decisions under the commerce clause are instructive and helpful; but in applying them it should be kept in mind that a State may lawfully tax the property of an interstate carrier employed in interstate commerce, while it cannot tax *as property or otherwise* the bonds described in the complaints.

(a) A tax measured by gross receipts from interstate commerce is void as a regulation of and burden on such commerce.

*Galveston, Harrisburg & San Antonio Ry. Co. vs. Texas*, 210 U. S. 217. A statute imposed a tax in the form of an excise upon railroads "equal to 1 per cent of their gross receipts, if such line of railroad lies wholly within the State." The road was wholly within Texas, but connected with other lines, and part of its gross receipts (sometimes the larger part) was derived from freight and passengers coming from or destined to points without the State. The Court held the tax was a burden on interstate commerce.

P. 227: "By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution." (Citing cases). The question is whether this is such a tax. It appears sufficiently, perhaps from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The State must be allowed to tax the property and to tax it at its actual value as a going concern. On the other hand the State cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislatures, by

giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the States so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form." (Citing cases).

"We are of opinion that the statute levying this tax does amount to an attempt to regulate commerce among the States. The distinction between a tax 'equal to' one per cent of gross receipts and a tax of one per cent of the same seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute taken by itself. . . . This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to'."

*Crew Leick Co. vs. Pennsylvania*, 245 U. S. 292. A law requiring a wholesale dealer to pay a percentage "on each dollar of the whole volume, gross, of business transacted annually," is by its necessary effect, "a tax upon such commerce, and therefore a regulation of it." (P. 295).

To the same effect,

*Ratterman v. Western Union Tel. Co.*, 127 U. S. 411;

*Cook v. Pennsylvania*, 97 U. S. 566;

*Meyer v. Wells, Fargo & Co.*, 223 U. S. 298;

*Philadelphia & So. S. S. Co. v. Pennsylvania*, 122 U. S. 326;

*Bowman v. Continental Oil Co.*, 256 U. S. 642.

(b) A tax upon the gross capital employed in interstate commerce is void as (1) a burden upon such commerce, and (2) a tax on property beyond the State.

*Western Union Telegraph Co. vs. Kansas*, 216 U. S. 1. Action to oust the Company from the State, except interstate business and business under its contract with the Government. The Company had been in the State many years. By an amended State law the Company was required as a condition of doing business to pay the State Treasurer a percentage

of "its authorized capital"—about \$20,500 tax. Held the requirement to pay a percentage of *authorized capital, wherever and however employed*, as a condition of doing a local business, was a regulation of and a burden upon interstate commerce because "*such is the necessary effect of the statute*, and that result cannot be avoided or concealed by calling the exaction of such a per cent of its capital stock a 'fee' for the privilege of doing local business. To hold otherwise is to allow form to control substance." (P. 37.)

This rule avoided the tax in the following cases:

Pullman Co. v. Kansas, 216 U. S. 56;

International Paper Co. v. Massachusetts, 246 U. S. 135, 141-145;

Looney, Atty. Gen., v. Crane Co., 245 U. S. 178;

Locomobile Co. v. Massachusetts, 246 U. S. 146;

Air-way Electric Appliance Corporation v. Day, 266 U. S. 71;

Norfolk & W. Ry. Co. v. Pennsylvania, 136 U. S. 114, 120;

Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, 216-19.

On the other hand a state revenue act does not necessarily burden or regulate interstate commerce, if,—

(a) The tax is based on *such fair proportion* of capital stock, or of total assets, or gross receipts, as the business done or property or mileage owned *in the State* bears to total business or total property or total mileage. Such a law is usually upheld as a *bona fide* effort to value and tax property *in the State*. Property of an interstate carrier or of one doing interstate business may lawfully be taxed by the State and valued as a part of the integral system. Each case is determined on its own facts, and by whatever name a tax may be called, "if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution."

U. S. Express Co. v. Minnesota, 223 U. S. 335, 347 & 8;

Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 25;

- Pittsburgh, Cin., Chic. & St. L. Ry. Co. v. Backus, 154 U. S. 421;  
 N. Y., Lake Erie & W. R. R. Co. v. Pennsylvania, 158 U. S. 431, 439;  
 Western Union Tel. Co. v. Taggart, 163 U. S. 1;  
 Adams Express Co. v. Ohio State Auditor, 165 U. S. 194;  
 Maine v. Grand Trunk Ry. Co., 142 U. S. 217;  
 Western Union Tel. Co. v. Massachusetts, 125 U. S. 530;  
 Cudahy Packing Co. v. Minnesota, 246 U. S. 452;  
 Shaffer v. Carter, 252 U. S. 37, 57;  
 Postal Telegraph Cable Co. v. Adams, 155 U. S. 688, 695;  
 St. Louis Southwestern Ry. Co. v. Arkansas, 235 U. S. 350;  
 Hump Hairpin Mfg. Co. v. Emerson, 258 U. S. 290, 294, 296;  
 State v. Pullman Co., 178 Wis. 240, 261, 274.

This is why it was held in the former *Northwestern Case* (163 Wis. 484; Affirmed, 247 U. S. 132) that the tax did not burden or interfere with interstate commerce, relying upon some of the cases above cited. The State court found as a fact, and the finding was accepted by this Court, that the tax was not in excess of what the Company would have paid as taxes upon its *taxable property*. *Tax-exempt securities were not involved*.

But the practical effect of a law is the important consideration. If apportionment of capital or property according to mileage is not a fair basis for a tax on the property in the State, the tax operates in law as a burden upon interstate commerce or as a tax on property outside the State, and is void.

Wallace v. Hines, 253 U. S. 66.

See also—

Union Tank Line Co. v. Wright, 249 U. S. 275, 282.

A tax or license upon one doing interstate and intrastate business, based on total capital stock, will usually be sustained if a *maximum limit of tax is fixed*—because the tax is “without the necessary effect of burdening interstate com-

merce"; (231 U. S. 87,) and "does not fluctuate with the volume of interstate business." (240 U. S. 235).

Baltic Mining Co. v. Massachusetts, 231 U. S. 68;

Kansas City, Ft. Scott & Memphis Ry. Co. v. Kansas,  
240 U. S. 227, 233, 235;

Cheney Bros. Co. v. Massachusetts, 240 U. S. 147.

The interstate commerce cases are consistent, and turn upon the application of one underlying principle, which was restated and applied in *U. S. Gilue Co. vs. Oak Creek*, 247 U. S. 321. A Wisconsin manufacturer, doing both local and interstate business, was taxed upon the proportion of *net income* received from business transacted and property located in the State, apportioned as prescribed. The Gilue Company sold within and without the State products manufactured in Wisconsin. It excluded from gross income receipts from products sold and delivered from its factory to customers outside the State, and receipts from products sold and delivered from branches in other states to which the products had previously been shipped,—on the theory that the receipts were from interstate commerce. It was held that as the law taxed *net income only from all sources*, interstate commerce was affected indirectly only, and not burdened. The Court reviews many cases, including two decided at the same term: *Crew Levick Co. vs. Pennsylvania* (245 U. S. 292), where a tax imposed on *gross receipts from interstate commerce* was held bad, because a direct burden on interstate commerce; and *Peck & Co. vs. Loure* (247 U. S. 165), where a tax on *net income* was sustained, though a portion of income was from interstate commerce; and then concludes:

"The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or

discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States." (P. 328).

This distinction was recognized in *Texas Transport & Terminal Co. vs. New Orleans*, 264 U. S. 150, where a majority of the Court held a license tax of \$400 on the resident representative of the steamship company, engaged wholly in foreign commerce, was a burden on interstate commerce. Two Judges dissented, not on the rule, but on its application. Dissenting, Mr. Justice Brandeis said (p. 156):

"On the other hand, the burden is deemed direct, where the tax . . . lays, like a gross receipts tax, a burden upon every transaction in such commerce 'by withholding for the use of the state a part of every dollar received in such transaction.'"

#### THE WISCONSIN TAX IMPOSES A DIRECT BURDEN ON THE BONDS

Applying the foregoing rules—even the more liberal ones on interstate commerce,—Sec. 76.34, Wis. Stats., as construed by the State Supreme Court, directly interferes with and imposes a burden upon the Government in the exercise of its constitutional power to borrow money.

The State has for six years taken annually from plaintiff's gross interest received from these tax exempt bonds an average of nearly \$45,000. This shows the result to the investor and how the Government is necessarily hampered in borrow-

ing money on bonds intended to yield a satisfactory *net return*. The State does not exact toll from *net income*, or *net profits*, so interference with the power to borrow money may be said to be indirect or negligible, but takes a portion of every dollar the securities yield. The amount so taken is measured by par of *bonds owned*, and is proportioned directly to gross income. The State's toll necessarily decreases net yield and depreciates the economic value of the bonds as property. Under ordinary conditions their market value will be "off" by an amount equal to a principal sufficient at the same rate to yield in interest the amount of the tax. Government bonds cannot be sold at favorable interest rates if their yield is subject to any form of taxation,—particularly to a direct charge on gross interest.

A \$1,000 tax exempt bond at  $4\frac{1}{4}\%$  interest, returns annually \$42.50. When the State takes 3% of that sum, or \$1.275, the net return is \$41.225. At  $4\frac{1}{4}\%$  interest, it requires a principal of \$30.00 to produce \$1.275 interest; so an investor satisfied with a net return of  $4\frac{1}{4}\%$  will not pay par for a \$1,000 bond when gross interest is burdened by a 3% tax. He will only pay \$970 for it, and the Government stands a loss of \$30 per \$1,000 on its borrowing power.

It suffers a like loss of \$30 per \$1,000 in borrowing on all the bonds described in the complaints:

\$1,000	at	4%	=	\$40.00	\$40.00	at	3%	=	\$1.20
30	at	4%	=	1.20					
<hr/>									
\$ 970	at	4%	=	\$38.80					

\$1,000	at	$4\frac{1}{4}\%$	=	\$42.50	\$42.50	at	3%	=	\$1.275
30	at	$4\frac{1}{4}\%$	=	1.275					
<hr/>									
\$ 970	at	$4\frac{1}{4}\%$	=	\$41.225					

\$1,000	at	$4\frac{1}{2}\%$	=	\$45.00	\$45.00	at	3%	=	\$1.35
30	at	$4\frac{1}{2}\%$	=	1.35					
<hr/>									
\$ 970	at	$4\frac{1}{2}\%$	=	\$43.65					

\$1,000	at	$4\frac{3}{4}\%$	=	\$47.50	\$47.50	at	3%	=	\$1.425
30	at	$4\frac{3}{4}\%$	=	1.425					
<hr/>									
\$ 970	at	$4\frac{3}{4}\%$	=	\$46.075					

In *Davis, Director General of Railroads, vs. Farmers Co-operative Equity Co.*, 262 U. S. 312, a Minnesota law, which permitted suit to be brought in the State by a non-resident on a cause of action that arose outside the State, and authorized service upon a local soliciting agent, was held to impose a burden upon interstate commerce.

*Minneapolis, St. P. & S. M. R. R. Co. vs. Railroad Commission of Wisconsin*, 183 Wis. 47, held that a State law requiring a railroad company, 80% or more of whose business is interstate, to pay the State a fee of \$2,500 as a condition of issuing \$22,500,000 of new securities, though reasonable in amount, (trivial in comparison to 3% annually on gross receipts), was a burden on and regulation of interstate commerce.

In practical effect, a State law which exacts from the holder of Government bonds \$3.00 for every \$100.00 of interest received, imposes a burden upon the borrowing power of the Government just as effectively whether the exaction is called a tax, an excise, or something else. A tax is as onerous by any other name. Many states, including Wisconsin, (Wis. Const. Art. 8, Sec. 1) may impose privilege and occupation taxes. Excise taxation appears more popular in the South. In many southern states the annual tax bill levies excises on almost every conceivable profession and business activity. An excise may be a fixed amount, or be based on income, gross or net. If the State Supreme Court is correct in these cases, then a way has been found whereby a state, by measuring an excise tax by gross income from all sources, can effectively tax the instrumentalities of the United States and impede the Government in the exercise of its constitutional power to borrow money.

There is no difference in this respect between an individual and a corporation taxpayer. Immunity from state taxation in any form is as complete when Government securities are owned by a corporation as when owned by an individual. These securities are exempt from the operation of every state revenue act which directly reaches them or the income from them.

THE CASES RELIED ON BY THE SUPREME COURT  
OF WISCONSIN WHEN APPLIED TO THE FACTS  
DO NOT SUSTAIN ITS CONCLUSION.

That Court thought the case was ruled by—

- N. W. Mutual Life Ins. Co. v. State, 163 Wis. 484;
- N. W. Mutual Life Ins. Co. v. Wisconsin, 247 U. S. 132;
- U. S. Express Co. v. Minnesota, 223 U. S. 335;
- Cudahy Packing Co. v. Minnesota, 246 U. S. 450;
- State Tax on Ry. Gross Receipts, 15 Wall. 284;
- Flint v. Stone Tracy Co., 220 U. S. 107 (R. 40-43).

The similarity is but slight between the former *Northwestern tax case* (163 Wis. 484; affirmed 247 U. S. 132), and this case. Different legal principles apply, although that case attacked the constitutionality of this same statute, upon the ground, among others, that it interfered with and regulated interstate commerce.

The State Court in that case did not decide whether the Company's business, insurance or investments, was interstate commerce in fact. It may be suggested, also, the receipts which measured the tax were from *investments* rather than from commerce. No income was created or earned until after the subjects of commerce (notes, mortgages, etc.) had come to rest. The Court found that the license tax was levied *in lieu of all other state taxes*; that the plaintiff had vast reserve funds invested in interest-bearing securities,—credits, that is, personal property of an intangible character, the situs of which for the purposes of taxation was in the State at the residence of the corporation; that these credits and securities were *taxable in Wisconsin*, and in justice to other taxpayers should contribute to the expenses of the Government; that it was for the State to decide whether such contribution should be by personal property taxation, income taxation, or by a license fee; that a personal property tax would have exacted a larger contribution than the license fee (pp. 491 to 493).

This Court (247 U. S. 132, 135-7) quotes the findings of the State Court, and concludes (p. 137):

"While these views of the nature and effect of the law are not conclusive upon us, they are accepted unless they appear to be ill founded, and we find no reason to reject them. The tax in question is, therefore, not only one for the privilege of doing life insurance business within the State, but is in effect a commutation tax, levied by the State in place of all other taxation upon the personal property of the company in the State of Wisconsin." (Italics ours).

P. 138: "The construction of the act by the state court brings the case within the decisions of this sort in *U. S. Express Co. v. Minnesota*, 223 U. S. 335; *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450. In the former case a commutation tax upon gross receipts of the express company from state and interstate business was sustained as casting no burden upon interstate commerce. In the *Cudahy Packing Co. Case* a tax of like character was held not a burden upon interstate commerce, although much of the gross receipts, which measured the property tax, was derived from such commerce. In both of these cases, following the previous decisions of this court, the tax was held to be within the authority of the State, and the inclusion in the measure of taxation of the receipts partly derived from interstate commerce was held not to invalidate the tax, its amount not being in excess of what would be legitimate as an ordinary tax on the property taken at its value."

"We have said thus much as to the alleged invalidity of this license tax as a burden upon interstate commerce, without deciding, as we do not find it necessary to decide, whether the so-called foreign investment business of the company does or does not of itself amount to interstate commerce. If it amounts to commerce of that character, no burden is cast upon it by such tax as is here involved, since the gross receipts coming from that character of business are used only as a measure of the value of the property and franchise lawfully taxable in the State."

In *United States Express Co. v. Minnesota*, 223 U. S. 335, (cited in the above quotation,) a Minnesota law required

express companies to report annually entire receipts from business done *within the state*, including their share of receipts from business done *in the state* in connection with other companies,—less the amount paid for transportation. From such reports the Auditor ascertained gross receipts less transportation paid, and assessed upon the Company a tax of 6% of gross receipts from business done within the State,—in lieu of all other taxes upon the property. The State Supreme Court held this was a tax *on the property* of the Express Company, and while that determination was not binding, this Court was not prepared to say the conclusion was not well-founded, in view of the provisions and purposes of the law.

P. 346: "The statute itself provides that the assessments under it 'shall be in lieu of all taxes upon its property.' In other words, this is the only mode prescribed in Minnesota for exercising the recognized authority of the State *to tax the property of express companies* as going concerns within its jurisdiction. If not taxed by this method, the property is not taxed at all." (Italics ours). (Citing with approval *McHenry v. Alford*, 168 U. S. 651).

*Cudahy Packing Co. v. Minnesota*, 246 U. S. 450, is like the *United States Express Company Case*, and applies to companies owning freight cars for hire which were taxed upon a percentage of gross earnings from mileage *within the State* in lieu of all other taxes. The decision was affirmed, because the State Court held "that this law is an exertion of the power of the State to tax the property within its limits from which the earnings are derived and is intended to embody a practical method of *reaching and valuing that property, tangible and intangible, for taxing purposes*." (Italics ours). (Pp. 452 & 3.)

Plaintiff has no fault to find with these decisions. They do not support the judgment of the State Supreme Court. In each of them the tax was treated as one on property, admittedly taxable, and gross receipts were taken as a measure of property value. As that measure did not increase the tax beyond what would be a fair property tax, interstate commerce was not unduly burdened or interfered with. None

of those cases involved taxing property which was *exempt from taxation*, which is the question involved here. As a tax on property, these bonds, being exempt, must be excluded in the valuation. This has been held consistently by this Court since *Bank of Commerce vs. Commissioners*, 67 U. S. 620 (2 Black); and *Bank Tax Case*, 69 U. S. 200.

Where a law imposes taxes on personal property, less debts of the taxpayer or less reserve and debts, Government bonds must be excluded from the calculation for all purposes; and it makes no difference that the allowable deductions may exceed in amount the tax-exempt bonds.

*Home Savings Bank v. Des Moines*, 205 U. S. 503, 511-515;

*Packard Motor Car Co. v. Detroit*, 232 Mich. 245;

*Farmers & Bankers Life Ins. Co. v. Anderson*, 117 Kan. 451;

*City of Waco v. Amicable Life Ins. Co.* (Tex.), 248 S. W. 332; (decided Feb. 28, 1923; not officially reported).

*State Tax on Ry. Gross Receipts*, 15 Wall. 284, decided by a divided court, is a border-line case. A Pennsylvania

statute provided that in addition to "taxes now provided by law," every domestic railway company, not liable to income tax, should pay the State a tax of three-fourths of 1% upon its gross receipts. The tax was computed from verified reports made at the end of each six months' period. The Company contended it could not be based on amounts received for transportation of freight coming from or destined for points outside the State. The Court realized and states that the proper rule is difficult of application to the facts (p. 296); but distinguishing *Case of the State Freight Tax*, 15 Wall. 232, decided at the same Term, held the State could tax the property of the corporation within the State or its franchises:

"The tax is laid upon the gross receipts of the company; laid upon a fund which has become the property of the company, mingled with its other property, and possibly expended in improvements or put out at inter-

est. The statute does not look beyond the corporation to those who may have contributed to its treasury. The tax is not levied, and, indeed such a tax cannot be, until the expiration of each half-year, and until the money received for freights, and from other sources of income, has actually come into the company's hands. Then it has lost its distinctive character as freight earned, by having become incorporated into the general mass of the company's property. While it must be conceded that a tax upon interstate transportation is invalid, there seems to be no stronger reason for denying the power of a State to tax the fruits of such transportation after they have become intermingled with the general property of the carrier, than there is of denying her power to tax goods which have been imported, after their original packages have been broken, and after they have been mixed with the mass of personal property in the country." (Citing *Brown v. Maryland*, 12 Wheat. 419, 491).

In the later case of *Philadelphia & Southern Steamship Co. v. Pennsylvania*, 122 U. S. 326, both of these *Freight Tax Cases* are reviewed, and the above reasoning in the *Gross Receipts Case* found "not tenable." (P. 342). (See also limitation of the rule on page 345).

*Flint vs. Stone, Tracy Co.*, 220 U. S. 107, was a consolidation in this Court of many independent cases, attacking the constitutionality of the corporation excise tax in the Tariff Act of 1909, passed under authority "to lay and collect taxes, duties, imposts and excises \* \* \* but all duties, imposts and excises shall be uniform throughout the United States." (Art. I, Sec. 8).

It required all corporations "to pay annually a special excise tax with respect to the carrying on or doing business by such corporation \* \* \* equivalent to one per cent upon the entire *net income over and above* \$5,000 received by it from all sources during such year." As the object was to declare the law void, the case did not involve any question of its practical administration. No plaintiff complained of actual injury because it had been compelled to *pay* an unlawful tax. It was not necessary therefore to decide whether "income

• • • received by it from all sources" did in fact cover interest from tax-exempt securities, except as bearing on the question Was the whole law invalid? This Court carefully limited the decision within the narrow scope presented by the issues, as appears from the closing paragraph of the opinion:

P. 177: "We have noticed such objections as are made to the constitutionality of this law as it is deemed necessary to consider. Finding the statute to be within the constitutional power of the Congress, it follows that the judgments in the several cases must be affirmed."

Interest received on tax-exempt securities is discussed at two points. On pages 147 to 152, it is said this was an excise and not a "direct tax" within the *constitutional sense*, so apportionment among the States according to population was not necessary—distinguishing *Pollock vs. Farmers Loan & Trust Co.*, 157 U. S. 429. The second is pages 162 to 165. Some of the plaintiffs, particularly insurance companies, held municipal bonds and other non-taxable securities, and owned real and personal property *not used in the business*. They contended that as the law in measuring the tax included income from all sources, it was unconstitutional "because it reaches property which is not the subject of taxation." In answer, the Court emphasizes the distinction we make, and which runs through all the cases, that any tax or charge by one sovereignty which attaches to *gross receipts* from an agency or instrumentality of another sovereignty is void because it interferes directly with the exercise of a governmental function, of which borrowing money is one; whereas, if the tax or charge reaches *net income* or *net profits only*, the law may be good, on the theory that the interference *may be found as a fact* to be merely indirect, incidental or negligible. Where net income or profits measure the tax, each case depends on its own facts and the tax will be permitted to stand or made to fall as the Court of last resort shall find that a sovereign right has or has not been invaded. Concerning a gross receipts tax, this Court said:

Pages 162-3: "Nor does the adoption of this measure of the amount of the tax do violence to the rule laid down in *Galveston, Harrisburg & San Antonio Ry. Co. v. Texas*, 210 U. S. 217, nor the *Western Union Tel. Co. v.*

*Kansas*, 216 U. S. 1. In the *Galveston Case* it was held that a tax imposed by the State of Texas, equal to one per cent upon the gross receipts 'from every source whatever' of lines of railroad lying wholly within the State, was invalid as an attempt to tax gross receipts derived from the carriage of passengers and freight in interstate commerce, which in some instances was much the larger part of the gross receipts taxed. This court held that this act was an attempt to burden commerce among the States, and the fact that it was declared to be 'equal to' one per cent made no difference, as it was merely an effort to reach gross receipts by a tax not even disguised as an occupation tax, and in nowise helped by the words 'equal to.' In other words, the tax was held void, as its substance and manifest intent was to tax interstate commerce as such.

In the *Western Union Telegraph Case* the State undertook to levy a graded charter fee upon the entire capital stock of one hundred millions of dollars of the Western Union Telegraph Company, a foreign corporation, and engaged in commerce among the States, as a condition of doing local business within the State of Kansas. This Court held, looking through form and reaching the substance of the thing, that the tax thus imposed was in reality a tax upon the right to do interstate business within the State, and an undertaking to tax property beyond the limits of the State; that whatever the declared purpose, when reasonably interpreted, the necessary operation and effect of the act in question was to burden interstate commerce and to tax property beyond the jurisdiction of the State, and it was therefore invalid."

On the record and issues in the *Flint Case*, no finding could have been made that the law taxed or burdened the exempt bonds owned by any one of the plaintiffs, or hindered the Federal Government or the several States in borrowing money. Net income, under the law, was arrived at by deducting from gross income expenses of operation, rents, losses, depreciation, interest, taxes, a \$5000 exemption, and, as to insurance companies in addition to the above, policy pay-

ments and the net addition to reserve funds. With these deductions allowed, it could not be said from any record that the tax was a direct burden on tax-exempt bonds. It did not appear what proportion of gross income as to any plaintiff came from interest on such bonds. If the 1909 law had taxed gross instead of net income, the *Flint Case* would have presented a question similar to this.

THE STATE OF WISCONSIN CANNOT IMPOSE UPON PLAINTIFF AS A CONDITION OF DOING BUSINESS IN THE STATE ANY CONDITION WHICH DEPRIVES IT OF RIGHTS CONFERRED BY THE FEDERAL CONSTITUTION AND THE LAWS OF CONGRESS, OR INTERFERES WITH THE EXERCISE OF SUCH RIGHTS.

It is freely admitted that the State has wide discretion in imposing terms upon domestic corporations for the right to do business; also upon foreign corporations; but such right is not without limit. The conditions must be lawful. We think the cases are clear that Wisconsin cannot impose upon plaintiff a condition that it do not buy bonds offered for sale by the United States to its citizens. In exercising that sovereign power the United States is not dependent upon the consent or assent of any State. Plaintiff in error possesses Corporate power to invest its assets, must do so in fact to function as a life insurance company.

Congress may borrow money, and make all laws necessary and proper to carry out that power. "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land, and the judges of every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." (U. S. Const. Art. VI.) (Appendix p. 84). In the sale of these bonds the Government dealt directly with the citizen. The Acts of 1870 and 1875, under which the United States 4s of 1925 were issued (R. 16), empowered the Secretary of the Treasury to "issue, sell and dispose of" the bonds without limitation. (Appendix p. 77, Act of 1875). The several Liberty and Victory Loan Acts, commanded the Secretary of the Treasury to offer each series "as a popular loan" under such regulations prescribed by

him "*as will* in his opinion give the *people of the United States* as nearly as may be an equal opportunity to participate therein." The Secretary was authorized to make allotments, to reject or reduce allotments, particularly those "upon applications from incorporated banks and trust companies for their own account." (U. S. Stats. 1917, pp. 35, 288; U. S. Stats. 1917-18, Part 1, pp. 502, 844, 965; U. S. Stats. 1919, Part 1, p. 1309). (Appendix pp. 77-79) These Acts also exempted from excess profits, war profits and surtaxes, interest from not to exceed specified amount of principal "owned by any individual, partnership, association or corporation." Every person was a potential bond buyer. "People" in the Acts included corporations.

Borrowing money necessarily requires a lender. To sell bonds presupposes a bond buyer. If the Federal Government has the superior and sovereign right to borrow money from and sell bonds "to the people of the United States," (which includes plaintiff), can a government inferior in this respect withhold from the people the right to lend or to buy? Plaintiff is a citizen. (163 Wis. 490). If the United States cannot deal directly with its own citizens on this subject, but is dependent upon either the good will or consent of the several States in any degree, its sovereignty is at an end. If Wisconsin cannot directly burden these bonds by tax, as is conceded, then it cannot by any other legislation perhaps more drastic interfere with the Government in the exercise of its borrowing power.

The laws of Congress in any sphere where the Federal Government is supreme extend throughout the United States and touch every individual. The Government may by force if necessary, through its official agents, execute the powers and functions belonging to it on every foot of American soil.

*Ex parte Siebold*, 100 U. S. 371;

*Northern Securities Co. v. U. S.*, 193 U. S. 197, 332-3;

*Newberry v. U. S.*, 256 U. S. 232, 281;

*Collector v. Day*, 11 Wall. 113, 124;

*Chinese Exclusion Case*, 130 U. S. 581, 604-5;

*In re Debs*, 158 U. S. 564, 578.

In *McCulloch vs. Maryland*, 4 Wheat. 316, 424, this Court said:

"No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution."

The same principle is stated in—

*Cohens v. Virginia*, 6 Wheat. 264, 414;

4 Ency. U. S. Sup. Ct. Rep., p. 213 (see), and Note 25;

4 Ency. U. S. Sup. Ct. Rep., p. 188 (ibid.), and Note 27;

29 Am. & Eng. Ency. of Law (2nd Ed.), p. 148.

No State can "retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress, to carry into execution the powers vested in the General Government."

*Weston v. Charleston*, 2 Pet. 149, 167;

*McCulloch v. Maryland*, 4 Wheat. 316.

The *Weston Case*, *supra*, involved the power of a State to tax stock issued by the United States under its borrowing power. In denying such right, the Court said a contract made by the Government in the exercise of its borrowing power (p. 167): "is undoubtedly independent of the will of any state in which the individual who lends may reside. . . . It is admitted that the power of the Government to borrow money cannot be directly opposed, and that any law directly obstructing its operation would be void; but, a distinction is taken between direct opposition and those measures which may consequentially affect it; that is, that a law prohibiting loans to the United States would be void, but a tax on them

to any amount is allowable." It is impossible, this Court said, not to perceive the two modes are intimately connected.

The *Legal Tender Cases*, 12 Wall. 457, held valid Acts of Congress making Treasury notes legal tender for all debts, on the ground that issuing the notes was incidental to the power to borrow money, and in order to make that power effective Congress could provide *that creditors must accept them*. The words of Judge Marshall in *M'Culloch vs. Maryland*, 4 Wheat. 421, were quoted with approval:

Page 523: "Let the end be legitimate, let it be within the scope of the Constitution, and all the means which are appropriate, which are plainly adapted to that end, which are not prohibited, but are consistent with the letter and spirit of the Constitution, are constitutional."

Concurring opinion, Mr. Justice Bradley:

Page 554: "The Constitution of the United States established a government, and not a league, compact, or partnership. It was constituted by the people. It is called a government \* \* \*. As a government it was invested with all the attributes of sovereignty. It is expressly declared in Article VI that the Constitution, and the laws of the United States made in pursuance thereof, and all treaties made under the authority of the United States, shall be the supreme law of the land." Again, on p. 565:

"So with the power of Government to borrow money, a power to be exercised by the consent of the lender, if possible, but to be exercised without his consent, if necessary. And when exercised in the form of a legal tender notes or bills of credit, it may operate for the time being to compel the creditor to receive the *credit of the government* in place of the gold which he expected to receive from his debtor."

See—

1 Rose's Notes, p. 1111;

Second Legal Tender Case, 100 U. S. 421, 448.

The principal of the Legal Tender Cases has been sustained in State courts.

Breitenbach v. Turner, 18 Wis. 140;

Thayer v. Hedges, 23 Ind. 141;

Brown v. Welch, 26 Ind. 116;

Hague v. Powers, 25 How. Pr. 17;

Reynolds v. Bank of Indiana, 18 Ind. 467, 469.

*Breitenbach vs. Turner, supra*, (p. 146) :

"Now it is apparent that any government which has the power to issue such a circulating medium as this, must of necessity have the power to declare its effect. The principal function of a circulating medium being its use for the payment of debts, the government which has the power to issue and establish it, must have the power to declare that it may be used with effect in the accomplishment of its chief object."

In *Hague vs. Powers, supra*, (p. 29), it is said Congress has power,

"to protect these notes from depreciation, and to enhance their value by making them a legal tender, as much as it has to prevent the debasement or counterfeiting of coin. What it creates it may protect by all suitable laws for that purpose, and by what means it will do so is especially a matter within the discretion of the law making power."

P. 33: "The issue of such notes, therefore, is simply a process to borrow money of the people of the United States, and the provision that such notes shall be a legal tender is, or may be, an essential means to that end. It is or may be essential to give currency to the notes and preserve them from depreciation, from the natural laws of trade, and the arts of speculators or of disloyal citizens." (Italics in original).

*Cohens vs. Virginia*, 6 Wheat. 264. The Charter of the City of Washington authorized it to sell lottery tickets. Cohens sold lottery tickets in Virginia in violation of a State law, and was arrested. The Virginia statute was held par-

amount to the Act of the City of Washington, because Congress has not itself established the lottery, but merely authorized the City of Washington to do so. Chief Justice Marshall, among other things, said (p. 444): "It has been said, that the States cannot make it unlawful to buy that which Congress has made it lawful to sell. This proposition is not denied." But before the Virginia law could be impeached, "we must inquire whether Congress intended to empower this corporation to do any act within a State which the laws of that State might prohibit."

Again, on p. 447:

"We very readily admit, that the act establishing the seat of government, and the act appointing commissioners to superintend the public buildings, are laws of universal obligation. We admit, too, that the laws of any State to defeat the loan authorized by Congress, would have been void, as would have been any attempt to arrest the progress \* \* \* of any other measure which Congress may adopt."

In *Tennessee vs. Davis*, 100 U. S. 257, defendant, indicted in the State court for murder, urged that the act was done in repelling an armed force while as deputy collector he was lawfully seizing illicit distilleries. Held he had the right to be tried in the Federal Court, and a motion to remand to the State court was denied. The Court (p. 262) quoted with approval *Martin vs. Hunter*, 1 Wheat. 363:

"The general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers."

Also p. 263:

"The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The State court may administer not only the laws of the State, but equally Federal law, in such a manner as to paralyze the operations of the government. \* \* \*"

"We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it."

In *Commonwealth ex. Knor*, 6 Mass. 76, the defendant, arrested for driving a stage-coach on the Sabbath, contrary to State law, answered he was employed by one Paine who had a contract with the Federal Government to carry the mail each day of the week. The defense was held good under the provision of the Federal Constitution authorizing Congress to establish postoffices and post roads. Page 77:

"And if a statute of any state should contain provisions prohibitory to the execution of powers authorized by a constitutional act of Congress, such provisions will not have the force of law."

The supremacy of the United States in respect of its constitutional power need not be expressly declared by law. In *Osborn ex. Bank*, 9 Wheat. 738, the Court declared invalid a State occupational or excise tax as applied to national banks, instrumentalities of the Government. It was argued that if the Bank should be tax free, the exemption should have "been expressly asserted in the act of incorporation; and, not being expressed, ought not to be implied"; but the Court answered (pp. 865-6):

"It is not unusual for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing, for an act of Congress to imply, without expressing, this very exemption from State control, which is said to be so ob-

jectionable in this instance. The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. It has never been doubted that all who are employed in them, are protected, while in the line of duty; and yet this protection is not expressed in any act of Congress. It is incidental to, and is implied in the several acts by which these institutions are created, and is secured to the individuals employed in them, by the judicial power alone; this is, the judicial power is the instrument employed by the government in administering this security."

When, therefore, the United States deals directly with its citizens in borrowing money, giving its obligations to pay, the State's assent is not necessary. It should be added the State of Wisconsin has not attempted to withhold assent. Its laws governing life insurance recognize that mutual insurance is insurance at cost, which requires investment of assets so interest collected will help maintain legal reserves; that in computing premiums and reserves there shall be assumed an interest rate of not less than three nor more than four per cent per annum. (Sec. 206.23); (Appendix p. 85); that surplus be distributed among policyholders annually (Sec. 206.36-38); (Appendix p. 85); that life companies invest in bonds of the United States. (R. 13). (Sec. 206.34, W. S. 1925). (Appendix p. 86).

But it was argued in the court below, that as the Wisconsin law measures the license fee or tax by "gross income from all sources", interest from these bonds is necessarily included; and when plaintiff accepts the license its right to do business is conditioned upon paying a tax so measured.

In answer, we submit the condition is invalid because in conflict with the Federal Constitution and laws of Congress. The principle of *Terral ex. Burke Construction Co.*, 257 U. S. 329, applies. A Missouri company, not engaged in interstate commerce, as a condition of doing business in Arkansas, agreed not to remove to the Federal Court any action brought in the State Court, on penalty of revocation of its license. The company removed a suit and enjoined the Secretary of State from revoking the license. Some earlier decisions, be-

ginning with *Insurance Company vs. Morse*, 20 Wall. 445, were expressly overruled, as the Court in more recent cases had held that as a condition of doing business therein, a State cannot (p. 532)

"exact from it a waiver of the exercise of its constitutional right to resort to the Federal Courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not. The principle does not depend for its application on the character of the business the corporation does, whether state or interstate, although that has been suggested as a distinction in some cases. It rests on the ground that the Federal Constitution confers upon citizens of one State the right to resort to Federal courts in another, that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law."

*Tyler vs. Dane County*, 289 Fed. 843 (Dist. Ct. Wis.), was an action to recover inheritance tax paid. Plaintiff's testator died a resident of Massachusetts, owning stock in corporations organized under the laws of states other than Massachusetts and Wisconsin, but licensed as foreign corporations to do business and owning property in Wisconsin. The disputed tax was paid because of ownership of stock in such foreign corporations. The State claimed the right to tax on the fact, among others, that the Wisconsin law prescribing conditions for foreign corporations to do business in the State, construed in connection with the law imposing a tax on the transfer of stock in such foreign corporations, was evidence that the State had conditioned the doing of business in the State upon giving such stock a local situs for succession tax purposes. The Judge assumed this contention to be correct in the absence of a State court decision, but held the condition void. (P. 854.)

"That the right of the State to condition the entry or continuance in business of a foreign corporation,

within the State, is subject to constitutional limitations, is settled. That a State may not tax a foreign corporation as to its property outside the confines of the State, even under the guise of a privilege or franchise tax imposed apparently *as a condition of entry or continuance*, has been held in several cases." (Italics ours).

He then quotes from *International Paper Co. vs. Massachusetts*, 246 U. S. 135:

"but the State cannot require the corporation as a condition of the right to do a local business therein to submit to a tax on its interstate business or on its property outside the State."

Appeal to this Court was dismissed by stipulation (266 U. S. 637) probably because of a decision on the subject by the State Supreme Court in *Estate of Shepherd*, 184 Wis. 88. There, also, it was argued that by accepting the provisions of Sec. 226.02, Stats. of 1923, (formerly Sec. 1770b), the corporation agreed to abide by State laws, including the one taxing the transfer of the stock therein, and (p. 95),

"therefore cannot question their validity. Assuming but not deciding that a corporation can bind its stockholders, no lengthy discussion is necessary to refute the fallacy of this claim. The foreign corporations by agreeing to abide by the conditions of Sec. 226.02 agree to abide by and obey our valid laws, not our void and unconstitutional laws. If we required them to do the latter, the Federal Supreme Court would speedily say we could not lawfully do so. *Terral vs. Burke Construction Co.*, 257 U. S. 529. It was there held that a State cannot exact as a condition for doing business within the State obedience to a State law that is repugnant to constitutional provisions. This Court has frequently said that an unconstitutional law is no law at all. It has no force or efficacy and cannot be obeyed."

If a State law is void which requires a foreign corporation to waive its constitutional right of removal, or to consent to be taxed upon income from interstate commerce or on property outside the State, it must be equally true that a law is void which attempts to coerce a domestic corporation

into consenting to be taxed, by excise or otherwise, upon gross interest received from bonds issued by the United States under the sovereign power of borrowing money.

*The United States can lawfully control the State on the subject of taxing its bonds and other instrumentalities; and has in express language denied to the State of Wisconsin the right to impose the particular tax plaintiff in error was compelled to pay.*

The State Supreme Court referred (R. p. 39) to the Federal exemption statutes and to the exemptions claimed by reason thereof, but it gave the legislation no force or effect and decided against the immunity provided by these statutes. This, we urge, was error.

As stated, Congress has power to borrow money on the credit of the United States, and to make all laws which shall be necessary and proper for carrying that power into execution. (U. S. Const., Art. I, Sec. VIII.) Laws made in pursuance thereof are the supreme law of the land. (Const., Art. VI.)

Prior to 1862 Congress had not expressly declared United States bonds and securities exempt from State taxation. Their tax-exempt character was based on the principles herein discussed. At times States attempted, not always without success, to collect revenue from these bonds; or their owners were subjected to litigation almost as expensive and burdensome as a tax. During the Civil War, when there arose the necessity of floating large loans at favorable rates, Congress passed the Act of February 25, 1862, now Section 3701, R. S. U. S.; (Appendix p. 82) "All stocks, bonds, treasury notes and other obligations of the United States shall be exempt from taxation by or under state or municipal or local authority." (See *Bank of Commerce vs. Commissioners* 67 U. S. 620.)

The first law, it will be observed, did not expressly extend the exemption to interest received—an omission supplied by Acts of January 14, 1875, and July 14, 1870,—which authorized the "U. S. A. 4s of 1925" in the complaint in Case No. 75; "all of . . . said . . . bonds and the interest thereon shall be exempt from the payment of all taxes or duties of

the United States as well as from taxation in any form by or under State, municipal or local authority; and the said bonds shall have set forth and expressed upon their face the above specified conditions." (18 U. S. Stats. at Large, p. 296; 16 U. S. Stats. at Large, p. 272). (See Appendix p. 76-77).

There was no further legislation on the subject until the World War. We may assume Congress fully appreciated, as did we all, the magnitude of the impending struggle and the financial burdens the country must assume; that loans must be at favorable interest rates or the nation would be swamped with interest charges. A review of earlier tax-exemption legislation and decisions was likely to produce an impression not wholly satisfactory. This Court had held Government bonds subject to State inheritance taxes (*Plummer vs. Coler*, 178 U. S. 115); the *Flint-Stone Case* and some interstate commerce decisions could perhaps be used as authority for States to impose excise or privilege taxes upon the bond owners, measured by *net income*. Congress intended the new bonds and the interest from them should not be burdened—even indirectly. This legislative thought appears clearly in the Liberty Loan Act of April 24, 1917, (Appendix p. 77): "The principal and interest thereof \* \* \* shall be exempt \* \* \* *from all taxation* except estate or inheritance taxes imposed by authority of the United States or its possessions, or by any State or local taxing authority." (U. S. Stats. 1917, p. 35). The Act of September 24, 1917, and later amendments, were even more emphatic, (Appendix p. 78): "All such bonds and certificates shall be exempt both as to principal and interest, *from all taxation* now or hereafter imposed by the United States, any State, or any of the possessions of the United States, or by any local taxing authority, except (a) estate or inheritance taxes, and (b) graduated additional income taxes, commonly known as surtaxes, and excess profits and war profits taxes, now or hereafter imposed by the United States, upon the income or profits of individuals, partnerships, associations, or corporations." (U. S. Stats. 1917, p. 288; U. S. Stats. 1917 and 1918, Part 1, pp. 502; 841; 965; U. S. Stats. 1919, Part 1, p. 1309). (Appendix p. 79).

"All taxation" means every species of tax—direct, excise, privilege,—emphasized by two exceptions allowed. Stronger language could not be used. Congress said to itself, to every State and taxing district, that, with two exceptions, no burden of any kind could be imposed upon the bonds or the interest from them.

Obviously the tax-exempt provision is germane to the constitutional power to borrow money. Congress deemed the exemption necessary and proper for carrying the power into execution, so the exemption became "the supreme law of the land"; for Congress spoke with authority.

Miller vs. Milwaukee 272 U. S. 713. Particularly concurring opinion p. 716.

That the Federal Government may control the States with respect to taxing its instruments, was announced many years ago by Chief Justice Marshall in *McCulloch vs. Maryland*, 4 Wheat. 316, where the Court held void a State statute taxing a branch of the United States Bank.

Page 421: "But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

Continuing, the opinion says that while the power to tax is vital to the States, not abridged by the grant of a similar power to the Government, yet "such is the paramount character of the constitution, that its capacity to withdraw any subject from the action of even this power, is admitted." (P. 425). (Italics ours).

From the principle that the Constitution and laws made pursuant to its authority are supreme and control laws and constitutions of the States, Judge Marshall deduces

as corollaries: "1. That a power to create implies a power to preserve. 2. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and to preserve. 3. That where this repugnancy exists, that authority which is supreme must control, not yield, to that over which it is supreme." (P. 426).

*Home Savings Bank vs. Dex Moinex*, 205 U. S. 503, involved the right to include Government bonds in valuing bank stock in a tax against the *bank*,—not the *stockholders*. The Court recognized (p. 509) the right of the State to tax its own banks as it chooses, "unless something is done which violates some provision of the Federal Constitution, or of a Federal law which by that Constitution is made supreme."

Page 513: "It may be well doubted whether Congress has the power to confer upon the States the right to tax obligations of the United States. However this may be, Congress has never yet attempted to confer such a right. Until the time of the Civil War it was not thought to be necessary to express the constitutional prohibition in an act of Congress. But on the occasion of authorizing the issue of Treasury notes it was enacted that 'all stocks, bonds, and other securities of the United States held by individuals, corporations, or associations within the United States shall be exempt from taxation by or under state authority.' \* \* \* The substance of this enactment is embodied in Sec. 3701 of the Revised Statutes, and has usually, if not invariably, since 1862, been inserted in acts authorizing the issue of bonds."

In *Smith vs. Kansas City Title & Trust Co.*, 255 U. S. 180, a stockholder sued to enjoin the Trust Company from investing in bonds of Federal and Joint Stock Land Banks, on the ground, among others, that the law which exempted such bonds from taxation was unconstitutional. The Act declared the bonds "to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation."

Page 212: "That the Federal Government can, if it sees fit to do so, exempt such securities from taxation,

seems obvious upon the clearest principles. But, it is said to be an invasion of state authority to extend the tax exemption so as to restrain the power of the State. Of a similar contention made in *McCulloch vs. Maryland*, Chief Justice Marshall uttered his often quoted statement: "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied." 4 Wheat. 431."

Page 213: "The exercise of such taxing power by the States might be so used as to hamper and destroy the exercise of authority conferred by Congress, and this justifies the exemption. If the States can tax these bonds they may destroy the means provided for obtaining the necessary funds for the future operation of the banks."

*Federal Land Bank of New Orleans vs. Crosland*, 261 U. S. 374. An Alabama law provided that a mortgage should not be recorded until certain "privilege or license taxes" were paid. When a recording officer refused on this ground to record a mortgage owned by the Federal Land Bank it brought mandamus. The Bank offered to pay the "recording fee", but not the tax. The State Supreme Court denied the writ on the theory that recording was optional; but this Court reversed the decision because, unless recorded, the mortgage was invalid against purchasers without notice. Here, clearly was an *excise tax*.

Of the exemption provision of the Federal Land Loan Act, the Court said (p. 377):

"The validity of this provision is not questioned. (Citing *Smith vs. Kansas City Title & Trust Co.*) Of course, therefore, it must prevail over any inconsistent laws of a State."

Page 378: "It (the State) has levied a general tax on mortgages, using the condition attached to registra-

tion as a practical mode of collecting it. In doing so, by the construction given to the statute by the Supreme Court, it has included mortgages that it is not at liberty to reach. The characterization of the act by the Supreme Court as distinguished from the interpretation of it does not bind this Court. (Citing cases). It is said that the lender may collect the money in advance from the borrower. We do not perceive that this makes any difference. The statute says that the lender must pay the tax, *but whoever pays it it is a tax upon the mortgage and that is what is forbidden by the law of the United States.*" (Italics ours).

*Grether vs. Wright*, 75 Fed. 742 (6th Circuit). Action to restrain the collection of back taxes against the estate of one Cornell, who in his lifetime had not listed for taxation his District of Columbia bonds. By Act of Congress the bonds were "exempt from taxation by Federal, State or Municipal authority." The county authorities claimed that for tax purposes District of Columbia bonds were on the same basis as State bonds—taxable by sister states. The Court found Congress intended a *general* exemption. Opinion by Taft:

Page 753: "• • • It is evident that, where Congress lawfully directs the issue of evidences of indebtedness in the exercise of any power derived by it from the Constitution, whether it be by virtue of the grant of power to borrow money on the credit of the United States, or of any other grant, such evidence of debt are exempt from state taxation, *or at least may be exempted therefrom if Congress sees fit to give them this quality.*" (Italics ours).

*Succession of Geier*, 155 La. 167, (99 So. 26). The War Risk Insurance Act provides that "insurance payable • • • shall be exempt from all taxation." Charles Geier carried war risk insurance, naming his mother as beneficiary. She died, so the insurance became payable to his surviving father and brothers and sisters. A decision by the lower court requiring the beneficiaries to pay the State inheritance tax was reversed.

Page 26: "The terms of the act are clear and unambiguous. Summarizing its provisions, there is a positive prohibition against all taxation on money paid out by the Federal Government under Section 28, Arts. 2, 3 and 4; and the insurance provision thereof is a contract between the United States, its agents, and the persons designated in the act as the beneficiaries of deceased service men. It is a bar to all state legislation which is in conflict with it.

Our attention has been called to the cases which hold that a state may impose an inheritance tax on the obligations and securities of the United States which form part of a succession. In those cases the property fell into the succession, no question of the violation of a contract was raised, and the decisions were based upon the finding that the tax was a tax upon the right to inherit and not a tax upon the property. In this case a contract is involved, and the tax sought to be enforced is a tax upon money paid out by the government under the provisions of the War Risk Insurance Act to the beneficiaries of a deceased service man. It may therefore be said that the jurisprudence established by the cases referred to can have no application to this case."

See also—

*Bank v. Supervisors*, 7 Wall. 26, 30;

*Fidelity & Deposit Co. v. Pennsylvania*, 240 U. S. 319, 323.

Power of Congress to control State legislation in fields where the Government is supreme is further exemplified by Federal laws (a) relating to taxing National Banks, and (b) touching interstate commerce.

**(a) STATES CAN TAX NATIONAL BANKS TO THE EXTENT ONLY AND IN THE MANNER PERMITTED BY CONGRESS.**

A National bank is a Government agency, and it has been held from early days that States can levy no tax, direct or indirect, upon them or their property or franchises.

*M'Culloch v. Maryland*, 4 Wheat. 316;  
*Osborn v. Bank of the United States*, 9 Wheat. 738;  
*Davis v. Elmira Savings Bank*, 161 U. S. 283;  
*Owensboro Natl. Bank v. Owensboro*, 173 U. S. 664, 667.  
*First National Bank v. Anderson*, 269 U. S. 341, 347;  
*First Natl. Bank vs. Hartford*, 47 S. C. R. 462 (decided  
 March 21, 1927).

The National banking system dates back to 1863. One provision in that Act, with amendments, became Section 5219 R. S. U. S., and permits States to tax National bank shares in the hands of the owners, but the tax "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State." Many State laws taxing National banks or National bank stock have failed because they did not observe this limitation.

At the time *Van Allen vs. The Assessors*, 70 U. S. 13 Wall. 1, p. 573, was decided the law contained a further limitation that the tax "shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the State where such association is located." A New York statute taxed National bank shares, "but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals of this State, provided that the tax so imposed upon such shares shall not exceed the par value thereof." Now as State bank shares *were not* taxed at all, the State tax was void; because stockholders in National banks could not be taxed on their shares when stockholders in State banks were not taxed on theirs.

Same rule—

*People v. Commissioners*, 94 U. S. 415, 418.

In *First National Bank vs. Adams*, 258 U. S. 362, the Bank was assessed upon its capital stock, surplus and undivided profits. Held the tax was void because Section 5219 "prescribes the full measure of the power of the several states to impose taxes upon national banking associations or their stockholders. Any assessment not in conformity therewith is unauthorized and invalid." (P. 364.) And "a tax levied upon a corporation measured by the value of its shares is not

equivalent to one upon the shareholders in respect of their shares." (P. 365).

In *San Francisco National Bank vs. Dodge*, 197 U. S. 70, the tax was void as discriminatory, because State banks and other moneyed corporations were taxed on the value of their physical property only, not including franchises, while shares in National banks were taxed at *market value*, which is book value of assets, plus good-will, dividend-earning capacity, and other intangible increments that go to make up market value.

In *Owensboro National Bank vs. Owensboro*, 173 U. S. 664, a Kentucky statute imposing a franchise tax upon corporations was held invalid as to National banks, because not confined to taxation of shares in the names of the stockholders. (P. 669). Nor was the tax saved because it happened to be equivalent in fact to what a tax on the shares would have been. (P. 683).

See also—

*Bank of California vs. Richardson*, 248 U. S. 476

Taxes on National bank shares have been held void under this section, because (a) assessed at a higher rate than moneyed capital, (b) inequality in valuation by assessors, or (c) the owner of credits could offset losses or debts by determining taxable value of property, while owners of National bank stock could not.

*Pelton v. Natl. Bank*, 101 U. S. 143;

*Evansville Bank v. Britton*, 105 U. S. 322;

*Merchants Natl. Bank v. Richmond*, 256 U. S. 635;

*Albany City Natl. Bank v. Maher*, 6 Fed. 417;

*First Natl. Bank v. Treasurer*, 25 Fed. 749;

*First Natl. Bank of Richmond v. Richmond*, 39 Fed. 309;

*First Natl. Bank v. Anderson*, 269 U. S. 341;

*First Natl. Bank v. Hartford*, 47 S. C. R. 462 (decided March 21, 1927).

(b) IN PROTECTION OF ITS POWER TO REGULATE COMMERCE AMONG THE STATES, CONGRESS MAY CONTROL STATE ACTION

**AS TO INTRASTATE TRANSACTIONS OF INTERSTATE CARRIERS. ITS POWER EXTENDS TO EVERY INSTRUMENTALITY OR AGENCY BY WHICH SUCH COMMERCE IS CARRIED ON.**

*Houston & Texas Ry. Co. vs. United States*, 234 U. S. 342.

Congress can require intrastate rates, though fixed by statute, to be raised so as to avoid discrimination against interstate rates.

Page 351: "Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field."

Congress has "power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled." (P. 353).

This case was followed in *Wisconsin Railroad Commission vs. C. B. & Q. Ry. Co.*, 257 U. S. 563, holding valid the 1920 Transportation Act, under which the Interstate Commerce Commission required Wisconsin intrastate passenger rates to be raised over the two cents per mile fixed by statute, in order that intrastate rates should contribute their just proportion in maintaining an adequate transportation system and prevent "any undue, unreasonable or unjust discrimination against interstate or foreign commerce." (Pp. 589 and 590).

The same rule—

*Minnesota Rate Cases*, 230 U. S. 352, 398-400, 432 & 3.

In *Minneapolis, St. P. & S. M. Ry. Co. vs. Railroad Commission*, 183 Wis. 47, the Wisconsin Supreme Court held a Wisconsin statute, requiring an interstate carrier to obtain the consent of the State Railroad Commission before issuing securities, was superseded by Section 20a of the

Transportation Act, which provides that an interstate carrier cannot issue securities "though permitted by the authorities creating the carrier corporation, unless and until, and then only to the extent that, upon application of the carrier . . . the Commission by order authorizes such issue;" because, said the Court (p. 63), "the power of Congress over commerce extends incidentally to every instrumentality or agency by which such commerce is carried on."

*Fulgham vs. Midland Valley Ry. Co.*, 167 Fed. 660, and *Watson vs. St. Louis, I. M. & S. Ry. Co.*, 169 Fed. 942 (affirmed 223 U. S. 745). The Federal Railroad Employers Liability Act superseded State laws regulating the relation between employers and employees engaged in interstate commerce.

*Addyston Pipe & Steel Co. vs. United States*, 175 U. S. 211, 228. The power to regulate commerce is not limited to protection from State interference, but includes power to prohibit private contracts that have interstate commerce for their object and violate the Anti-Trust Act.

The interstate commerce clause is the constitutional source of power for Congress to prohibit the interstate traffic in lottery tickets (*Lottery Case*, 188 U. S. 321); for passing the Adamson Act (*Wilson vs. New*, 243 U. S. 332, 352); the White Slave Act (*Hoke vs. United States*, 227 U. S. 308); the commodities clause of the Hepburn Act (*United States vs. Delaware & Hudson R. Co.*, 213 U. S. 366); the Sherman Anti-Trust Act, prohibiting contracts in restraint of trade (*United States vs. Trans-Missouri Freight Assn.*, 166 U. S. 290).

#### QUESTION IS ONE OF POWER, NOT AMOUNT OF TAX

It is immaterial that the State by some other plan of taxation might have lawfully taxed plaintiff in error an equivalent amount.

*Frick vs. Pennsylvania*, 268 U. S. 473, involved the validity of a law of Pennsylvania imposing an inheritance tax on Frick's tangible personal property located in New York and Massachusetts. As such property could be transferred only in accordance with the laws of these states, the Court

held the Pennsylvania law void because the State lacked jurisdiction of the *property* itself and the *transfer thereof*. Jurisdiction of one or the other was necessary to sustain the tax. The State Court held that in taxing the transfer of Frick's Pennsylvania property, it could use as a basis of computation the combined value of *all his property wherever situated*. That, in substance, is the argument here,—that Wisconsin, in computing the amount of plaintiff's tax, may include income from property which it has no power to tax. In answer, the Court said (p. 494) :

"Of course, this was but the equivalent of saying that it was admissible to measure the tax by a standard which took no account of the distinction between what the State had power to tax and what it had no power to tax, and which necessarily operated to make the amount of the tax just what it would have been had the State's power included what was excluded by the Constitution. This ground, in our opinion, is not tenable. It would open the way for easily doing indirectly what is forbidden to be done directly, and would render important constitutional limitations of no avail. If Pennsylvania could tax according to such a standard, other States could. It would mean, as applied to the Frick estate, that Pennsylvania, New York and Massachusetts could each impose a tax based on the value of the entire estate, although severally having jurisdiction of only parts of it. Without question each State had power to tax the transfer of so much of the estate as was under its jurisdiction, and also had some discretion in respect of the rate; but none could use that power and discretion in accomplishing an unconstitutional end, such as indirectly taxing the transfer of the part of the estate which was under the exclusive jurisdiction of others." (Citing cases).

In the course of the opinion (p. 496) the Court distinguished *Plummer vs. Coler*, 178 U. S. 115, where it was held a State (there being no affirmative showing that the borrowing power of the United States was affected) could include in the transfer tax the value of tax exempt bonds because the State had jurisdiction over *the transfer of the bonds from ancestor to heir or legatee*.

The stamp tax on bills of lading held bad in *Fairbank vs. United States*, 181 U. S. 283, was only ten cents; but "the question of power is not to be determined by the amount of the burden attempted to be cast. The constitutional language is 'no tax or duty.' A ten-cent tax or duty is in conflict with that provision as certainly as an hundred dollar tax or duty. Constitutional mandates are imperative. The question is never one of amount, but one of power. The applicable maxim is '*obsta principis*,' not '*de minimis non curatur lex*.'" (Pp. 291 and 2).

*Queensboro National Bank vs. Queensboro*, 173 U. S. 664, p. 683:

"\* \* \* If mere coincidence of amount and not legal power be the test, only a pure question of fact would arise in any given case. The argument that public policy exacts that where there is an equality in amount between an unlawful tax and a lawful one, the unlawful tax should be held valid, does not strike us as worthy of serious consideration."

*Home Savings Bank vs. Des Moines*, 205 U. S. 503, p. 519:

"If the State has not the power to levy this tax, we will not inquire whether another tax which it might lawfully impose would have the same ultimate incidence."

*First Natl. Bank v. Adams*, 258 U. S. 362, 365;

*Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 497.

Relying upon these principles and authorities, plaintiff in error believes itself entitled to relief in this Court; and submits the judgments in the court below ought to be reversed.

Respectfully submitted,

GEORGE LINES,

SAM T. SWANSEN,

*Counsel for Plaintiff in Error.*

## APPENDIX.

Subdivision (2) of Section 76.37, Wisconsin Statutes 1923:

"No suit shall be brought to restrain or enjoin the collection of any license fee imposed or provided for by sections 76.30 to 76.37, inclusive. Any company, corporation, or association, aggrieved by the payment of any such license fee, may maintain a suit against the state for the recovery thereof in the circuit court for Dane County within six months from the time of the payment thereof. The state may be served with a summons in such suit by delivering a copy to the attorney-general or having (leaving) it at his office in the capitol with one of his assistants."

Section 76.34, Wisconsin Statutes 1923, (which is the same as Section 1211.35, Wis. Stats. 1919, and Section 51.32, Wis. Stats. 1917):

"Every company, corporation or association transacting the business of life insurance within this state, excepting only such fraternal societies as have lodge organizations and insure the lives of their own members, and no others, shall, on or before the first day of March, in each year, pay into the state treasury as an annual license fee for transacting such business the amounts following:

(1) If such company, corporation or association is organized under the laws of this state, three per centum of its gross income from all sources for the year ending December thirty-first, next prior to said first day of March excepting therefrom income from rents of real estate upon which said company, corporation or association has paid the taxes assessed thereon, and excepting also premiums collected on policies of insurance and contract for annuities.

(2) (Deals with foreign companies).

(3) Such license, when granted shall authorize the company, corporation or association to whom it is is-

sued to transact business until the first day of March of the ensuing year, unless sooner revoked or forfeited. The payment of such license fee as shall be in lieu of all taxes for any purpose authorized by the laws of this state, except taxes on such real estate as may be owned by such company, corporation or association."

Act of Congress approved July 14, 1870; (16 U. S. Stats at Large, p. 272): "Chap. CCLVI.—An Act to Authorize the Refunding of the National Debt."

*"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Treasury is hereby authorized to issue, in a sum or sums not exceeding in the aggregate two hundred million dollars, coupon or registered bonds of the United States, in such form as he may prescribe, and of denominations of fifty dollars, or some multiple of that sum, redeemable in coin of the present standard value, at the pleasure of the United States, after ten years from the date of their issue, and bearing interest, payable semiannually in such coin, at the rate of five per cent. per annum; also a sum or sums not exceeding in the aggregate three hundred million dollars of like bonds, the same in all respects, but payable at the pleasure of the United States, after fifteen years from the date of their issue, and bearing interest at the rate of four and a half per cent. per annum; also a sum or sums not exceeding in the aggregate one thousand million dollars of like bonds, the same in all respects, but payable at the pleasure of the United States, after thirty years from the date of their issue, and bearing interest at the rate of four per cent. per annum; all of which said several classes of bonds and the interest thereon shall be exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal, or local authority; and the said bonds shall have set forth and expressed upon their face the above-specified conditions, and shall, with their coupons, be made payable at the treasury of the United States. But nothing in this act, or in any other law now in force, shall be construed to

authorize any increase whatever of the bonded debt of the United States."

Act of Congress approved January 14, 1875; (18 U. S. Stats. at Large, p. 296): "Chap. 15.—An act to provide for the resumption of specie payments."

"Sec. 3. \* \* \* \* \* And to enable the Secretary of the Treasury to prepare and provide for the redemption in this act authorized or required, he is authorized to use any surplus revenues, from time to time, in the Treasury not otherwise appropriated, and to issue, sell, and dispose of, at not less than par, in coin, either of the descriptions of bonds of the United States described in the act of Congress approved July fourteenth, eighteen hundred and seventy, entitled, 'An act to authorize the refunding of the national debt,' with like qualities, privileges, and exemptions, to the extent necessary to carry this act into full effect, and to use the proceeds thereof for the purposes aforesaid. And all provisions of law inconsistent with the provisions of this act are hereby repealed."

Act of Congress approved April 24, 1917; (41 U. S. Stats., p. 35): First Liberty Bond Act.

"Chap. 4.—An Act To authorize an issue of bonds to meet expenditures for the national security and defense, and, for the purpose of assisting in the prosecution of the war, to extend credit to foreign governments, and for other purposes."

\* \* \* \* \*

The bonds herein authorized shall be in such form and subject to such terms and conditions of issue, conversion, redemption, maturities, payment, and rate and time of payment of interest, not exceeding three and one-half per centum per annum, as the Secretary of the Treasury may prescribe. The principal and interest thereof shall be payable in United States gold coin of the present standard of value and shall be exempt, both as to principal and interest, from all taxation, except estate or inheritance taxes, imposed by authority of the United States, or its possessions, or by any State or

local taxing authority; but such bonds shall not bear the circulation privilege.

The bonds herein authorized shall first be offered at not less than par as a popular loan, under such regulations prescribed by the Secretary of the Treasury as will give all citizens of the United States an equal opportunity to participate therein; and any portion of the bonds so offered and not subscribed for may be otherwise disposed of at not less than par by the Secretary of the Treasury; but no commissions shall be allowed or paid on any bonds issued under authority of this Act."

Act of Congress approved September 24, 1917: (47 U. S. Stats., p. 288): Second Liberty Bond Act.

"Chap. 56.—An Act To authorize an additional issue of bonds to meet expenditures for the national security and defense, and, for the purpose of assisting in the prosecution of the war, to extend additional credit to foreign Governments, and for other purposes."

.....

The bonds herein authorized shall from time to time first be offered at not less than par as a popular loan, under such regulations, prescribed by the Secretary of the Treasury from time to time, as will in his opinion give the people of the United States as nearly as may be an equal opportunity to participate therein, but he may make allotment in full upon applications for smaller amounts of bonds in advance of any date which he may set for the closing of subscriptions and may reject or reduce allotments upon later applications and applications for larger amounts, and may reject or reduce allotments upon applications from incorporated banks and trust companies for their own account and make allotment in full or larger allotments to others, and may establish a graduated scale of allotments, and may from time to time adopt any or all of said methods, should any such action be deemed by him to be in the public interest: *Provided*, That such reduction or increase of allotments of such bonds shall be made under general rules to be prescribed by said Secretary and shall apply to all subscribers similarly situated. And any portion

of the bonds so offered and not taken may be otherwise disposed of by the Secretary of the Treasury in such manner and at such price or prices, not less than par, as he may determine."

P. 291: "Sec. 7. That none of the bonds authorized by section one, nor of the certificates authorized by section five, or by section six, of this Act, shall bear the circulation privilege. All such bonds and certificates shall be exempt, both as to principal and interest, from all taxation now or hereafter imposed by the United States, any State, or any of the possessions of the United States, or by any local taxing authority, except (a) estate or inheritance taxes, and (b) graduated additional income taxes, commonly known as surtaxes, and excess profits and war-profits taxes, now or hereafter imposed by the United States, upon the income or profits of the individuals, partnerships, associations, or corporations. The interest on an amount of such bonds and certificates the principal of which does not exceed in the aggregate \$5,000, owned by any individual, partnership, association, or corporation, shall be exempt from the taxes provided for in subdivision (b) of this section."

Act of Congress approved March 3, 1919; (U. S. Stats. 19, Part 1, p. 1309): Victory Liberty Loan Act.

"Chap. 100.—An Act To amend the Liberty Bond Acts and the War Finance Corporation Act, and for other purposes."

*"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Second Liberty Bond Act is hereby amended by adding thereto a new section to read as follows:

"Sec. 18. (a) That in addition to the bonds and certificates of indebtedness and war-savings certificates authorized by this Act and amendments thereto, the Secretary of the Treasury, with the approval of the President, is authorized to borrow from time to time on the credit of the United States

for the purposes of this Act, and to meet public expenditures authorized by law, not exceeding in the aggregate \$7,000,000,000, and to issue therefor notes of the United States at not less than par in such form or forms and denomination or denominations, containing such terms and conditions, and at such rate or rates of interest, as the Secretary of the Treasury may prescribe, and each series of notes so issued shall be payable at such time not less than one year nor more than five years from the date of its issue as he may prescribe, and may be redeemable before maturity (at the option of the United States) in whole or in part, upon not more than one year's nor less than four months' notice, and under such rules and regulations and during such period as he may prescribe.

“(b) The notes herein authorized may be issued in any one or more of the following series as the Secretary of the Treasury may prescribe in connection with the issue thereof:

“(1) Exempt, both as to principal and interest, from all taxation (except estate or inheritance taxes) now or hereafter imposed by the United States, any State, or any of the possessions of the United States, or by any local taxing authority;

“(2) Exempt, both as to principal and interest, from all taxation now or hereafter imposed by the United States, any State, or any of the possessions of the United States, or by any local taxing authority, except (a) estate or inheritance taxes, and (b) graduated additional income taxes, commonly known as surtaxes, and excess profits and war-profits taxes, now or hereafter imposed by the United States, upon the income or profits of individuals, partnerships, associations, or corporations;

“(3) Exempt, both as to principal and interest, as provided in paragraph (2); and with an additional exemption from the taxes referred to in clause (b) of such paragraph, of the interest on an

amount of such notes the principal of which does not exceed \$30,000, owned by any individual, partnership, association, or corporation; or

“(4) Exempt, both as to principal and interest, from all taxation now or hereafter imposed by the United States, any State, or any of the possessions of the United States, or by any local taxing authority, except (a) estate or inheritance taxes, and (b) all income, excess profits, and war-profits taxes, now or hereafter imposed by the United States, upon the income or profits of individuals, partnerships, associations, or corporations

“(c) If the notes authorized under this section are offered in more than one series bearing the same date of issue, the holder of notes of any such series shall (under such rules and regulations as may be prescribed by the Secretary of the Treasury) have the option of having such notes held by him converted at par into notes of any other such series offered bearing the same date of issue.

“(d) None of the notes authorized by this section shall bear the circulation privilege. The principal and interest thereof shall be payable in United States gold coin of the present standard of value. The word “bond” or “bonds” where it appears in sections 8, 9, 10, 14, and 15 of this Act as amended, and sections 3702, 3703, 3704, and 3705 of the Revised Statutes, and section 5200 of the Revised Statutes as amended, but in such sections only, shall be deemed to include notes issued under this section.”

Sec. 2. (a) That until the expiration of five years after the date of the termination of the war between the United States and the German Government, as fixed by proclamation of the President, in addition to the exemptions provided in section 7 of the Second Liberty Bond Act in respect to the interest on an amount of bonds and certificates, authorized by such Act and amendments thereto, the principal of which does not exceed in the aggre-

gate \$5,000, and in addition to all other exemptions provided in the Second Liberty Bond Act or the Supplement to Second Liberty Bond Act, the interest received on and after January 1, 1919, on an amount of bonds of the First Liberty Loan Converted, dated November 15, 1917, May 9, 1918, or October 24, 1918, the Second Liberty Loan converted and unconverted, the Third Liberty Loan, and the Fourth Liberty Loan, the principal of which does not exceed \$30,000 in the aggregate, owned by any individual, partnership, association, or corporation shall be exempt from graduated addition income taxes, commonly known as surtaxes, and excess profits and war-profits taxes, now or hereafter imposed by the United States, upon the income or profits of individuals, partnerships, associations, or corporations.

(b) In addition to the exemption provided in subdivision (a), and in addition to the other exemptions therein referred to, the interest received on and after January 1, 1919, on an amount of the bonds therein specified the principal of which does not exceed \$20,000 in the aggregate, owned by any individual, partnership, association, or corporation, shall be exempt from the taxes therein specified; *Provided*, That no owner of such bonds shall be entitled to such exemption in respect to the interest on an aggregate principal amount of such bonds exceeding three times the principal amount of notes of the Victory Liberty Loan originally subscribed for by such owner and still owned by him at the date of his tax return."

United States Revised Statutes 1873-1874 (2nd Ed.), p. 731:

"Sec. 3701. All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority."

Wis. Stats. 1923:

Sec. 70.11: "The property in this section described is exempt from taxation, to wit:

• • • • •

(14) All the personal property of all insurance companies that now are or shall be organized or doing business in this state."

Sec. 71.05: "There shall be exempt from taxation under this chapter income as follows, to wit:

• • • • •

(3) Incomes derived from property and privileges by persons now required by law to pay taxes or license fees directly into the treasury of the state in lieu of taxes, and such persons shall continue to pay taxes and license fees as heretofore."

Sec. 206.02 (10): "No life insurance corporation whatever shall do any business in this state, nor shall any person act as agent or otherwise within this state in receiving or procuring applications for life insurance or in any manner aid in transacting such business for any such corporation until it shall have first procured a license from said commissioner authorizing it to issue policies of insurance in this state and have paid therefor the license fee required to be paid by section 76.34, provided, that in case any such life insurance corporation organized under the laws of any other state or country, having procured license as herein provided, shall remove or make application to remove into any court of the United States any action or proceeding begun in any court of this state upon a claim or cause of action arising out of any business or transaction done in this state it shall be and is hereby made the imperative duty of the commissioner to revoke any and every authority, license or certificate granted to such corporation or any agent thereof to transact any business in this state, and no such corporation or agent thereof shall thereafter transact any business of insurance in this state, till again duly authorized, and no renewal, license or certificate of authority shall be granted to such corporation

for three years after such revocation; and, provided further, that if the license of any such corporation shall be revoked as aforesaid, the attorney last appointed and the agent last designated as acting as such for it shall continue attorney and agent for the purpose of serving process for beginning actions upon any policy or liability incurred or contracted in this state, while it transacted business therein so long as any such liability shall exist."

Sec. 206.16: "No company shall transact business in this state until it shall have obtained a license therefor from the commissioner of insurance. No such license shall be issued until the company has complied with all the requirements of the laws of this state, nor until after such examination as he may require, the commissioner is satisfied that its assets are properly and safely secured and exceed its liabilities, valuing its policies as provided by the law of this state. Such value shall be computed according to the face or nominal sum named in such policies or certificates of membership, whether payment thereof is absolute and provided for by the collection of fixed premiums or is contingent upon assessments to be levied upon and collected from the members of such corporation or company."

United States Constitution; Art. I, Sec. 8,—

"The Congress shall have power \* \* \*

(2) To borrow money on the credit of the United States;

.....

(18) To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

United States Constitution, Art. VI (2):

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authori-

ty of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

Wisconsin Statutes 1923:

Sec. 206.23 (2): "The rate of interest assumed in computing premiums and reserves shall not be less than three, nor more than four per centum per annum."

Sec. 206.36: "Every life insurance corporation doing business in this state upon the principle of mutual insurance, or the members of which are entitled to share in the surplus funds thereof may make distribution of such surplus as they may have accumulated annually, or once in two, three, four or five years as the directors thereof may from time to time determine. In determining the amount of the surplus to be distributed there shall be reserved an amount not less than the aggregate net value of all the outstanding policies, said value to be computed by the American Experience Table of Mortality with interest not exceeding four and one-half per cent. Nothing in this section shall be construed to hereafter permit any such corporation to defer the distribution, apportionment or accounting of surplus to policyholders for a longer period than five years, and on all policies, hereafter outstanding, under the conditions of which the actual distribution is provided for at a definite or fixed period, the apportioned surplus shall be carried as a liability to the class of policies on which the same was accumulated."

Sec. 206.37: "Every life insurance company having in force any policy of insurance issued or delivered in this state upon the mutual or participating plan, shall annually, as of the thirty first day of December, ascertain and determine the excess of its assets over all reserve liabilities and all other liabilities constituting its profits, savings, earnings or surplus, and also the amount of unapportioned surplus which it will retain therefrom as a contingency reserve. After setting aside such unapportioned surplus, such sums as may be required for

the payment of authorized dividends upon the capital stock, if any, and such sums as may properly be held for account of existing deferred dividend policies, the remaining surplus shall be apportioned equitably to all other policies entitled to share therein."

Sec. 206.38: "On all participating policies of life insurance heretofore or hereafter issued in this state, excepting policies of industrial insurance or of paid-up or temporary and pure endowment or other stipulated form of insurance issued or granted in exchange for lapsed or surrendered policies, and policies under the conditions of which the distribution of profits, savings, earnings or surplus is deferred for more than one year from the date of the policy, and contingent upon the policy being in force and the insured living at the completion of the period for which such distribution is deferred, the company shall annually ascertain and credit the share of each such policy in the profits, savings, earnings or surplus."

Sec. 206.34: (1) "Every life insurance company organized under the laws of this State may invest its assets as follows:

(a) In the lawfully authorized bonds or other evidence of indebtedness of the United States or of any state of the United States, or of the District of Columbia, or of the Dominion of Canada, or of any province or city thereof."

Fifty fifth Annual Report of the Commissioner of Insurance of the State of Wisconsin for 1924 (business of 1923), p. 8.

#### "Expenses of Conducting the Insurance Department

The annual appropriation granted by the legislature for the expenses of conducting the Insurance Department is \$52,300. The following table shows the actual amount expended for the past five years:

Fiscal Year Ending		Printing.	
	Salaries	Postage, etc.	Total.
June 30, 1923			
1923 .....	\$30,130.10	\$ 8,884.39	\$39,014.49
1922 .....	30,840.34	11,027.03	41,867.37
1921 .....	33,881.63	10,194.57	44,076.20
1920 .....	31,005.62	10,336.67	41,342.29
1919 .....	34,436.75	10,443.47	44,880.22

#### Receipts of the Insurance Department.

The receipts of the Insurance Department for the fiscal year ending June 30, 1923, amounted to \$1,599,335.05, which represents the largest amount ever collected by this department. The state tax collected amounted to \$1,261,532.64, of which the life insurance companies paid \$918,500.88, the casualty companies \$182,514.44, the fire insurance companies \$160,290.13 and various individuals \$227.19.

Included in the \$125,552.77 fees collected is an amount of \$4,728.37 examination expense. This is the actual expense of the department in conducting examinations of insurance companies during 1923. The remaining amount in this item is for agent's licenses and other fees. The Fire Department Dues are collected by the commissioner and then paid to the cities, villages and towns entitled to them.

Fiscal Year Ending June 30, 1923	State Tax	Fire Marshal Tax	Fire Dept. Dues	Fees	Total
1923	\$1,261,332.64		\$212,249.64	\$125,552.77	\$1,599,335.05
1922	1,125,136.04		211,107.69	121,084.25	1,457,327.98
1921	1,057,786.22		243,280.25	114,888.44	1,415,954.91
1920	914,405.88	\$47,154.85	192,127.12	106,323.13	1,250,010.98
1919	\$33,317.28	42,365.27	163,169.94	82,152.20	1,141,004.69

FILED

OCT 24 1927

CHARLES ELMORE CROPLEY  
CLERK

IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1927

THE NORTHWESTERN MUTUAL LIFE  
INSURANCE COMPANY,  
*Plaintiff in Error*

v.

THE STATE OF WISCONSIN,  
*Defendant in Error.*

No. 75

THE NORTHWESTERN MUTUAL LIFE  
INSURANCE COMPANY,  
*Plaintiff in Error,*

v.

THE STATE OF WISCONSIN,  
*Defendant in Error.*

No. 76

**BRIEF FOR DEFENDANT IN ERROR**

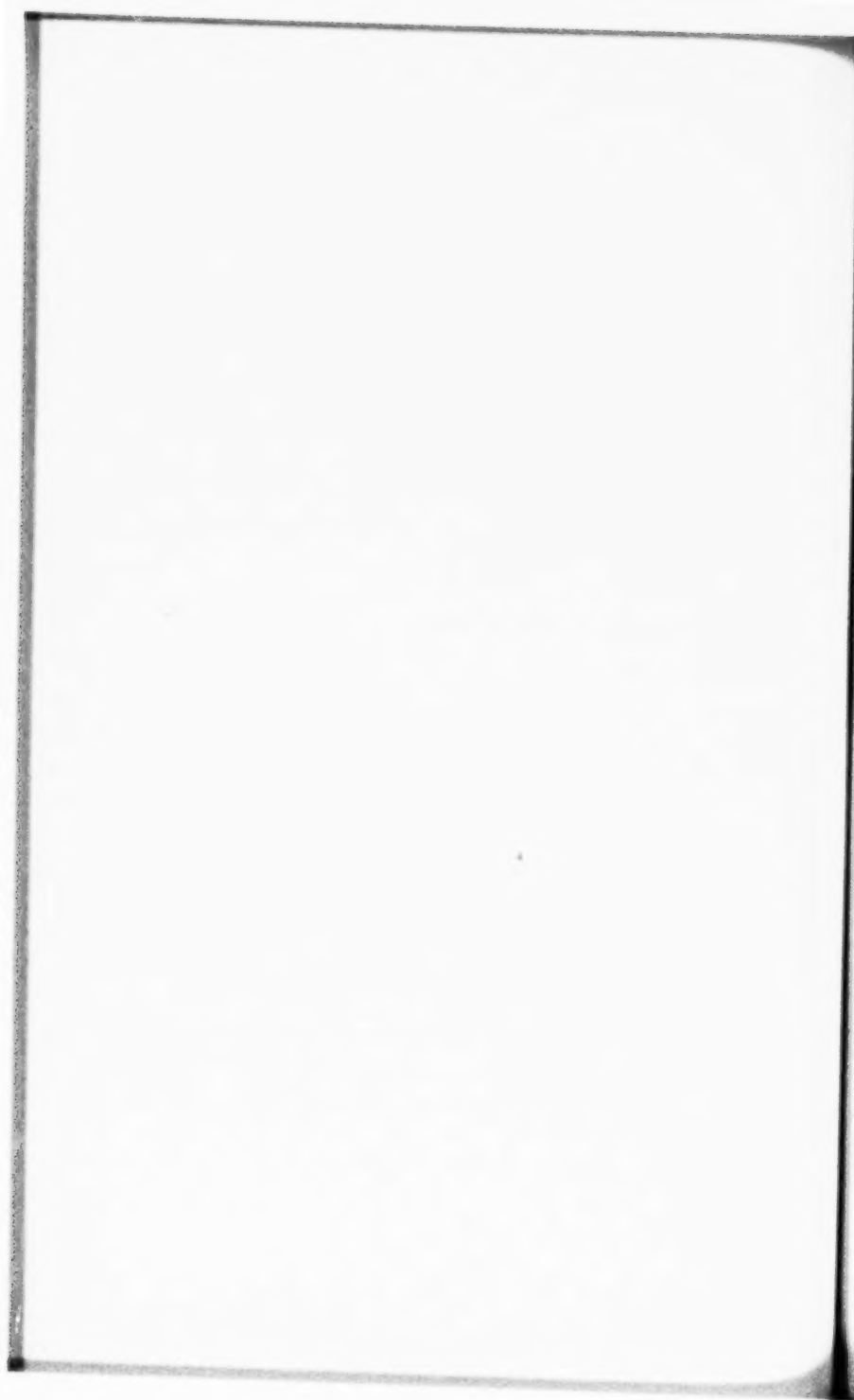
JOHN W. REYNOLDS,  
*Attorney General,*

FRANKLIN E. BUMP,  
*Assistant Attorney General,  
of the State of Wisconsin,  
Counsel for Defendant in Error.*

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1927

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THE NORTHWESTERN MUTUAL LIFE  
INSURANCE COMPANY,  
*Plaintiff in Error,*

v.

THE STATE OF WISCONSIN,  
*Defendant in Error.*

No. 75

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THE NORTHWESTERN MUTUAL LIFE  
INSURANCE COMPANY,  
*Plaintiff in Error,*

v.

THE STATE OF WISCONSIN,  
*Defendant in Error.*

No. 76

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**BRIEF FOR DEFENDANT IN ERROR**

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Cases on writ of error to review the unanimous decision and the judgments of the supreme court of Wisconsin reported in Vol. 189 Wisconsin Reports at pages 103 and 114.

The judgment and opinion of the state supreme court in case No. 75 is printed commencing on page 37 of the

transcript of the record, and in case No. 76, on page 27 of the transcript of the record.

## OUTLINE STATEMENT OF THE CASE

### *History*

A general demurrer to the complaints in both cases was sustained by the trial court, Judge E. Ray Stevens (now a member of the Wisconsin supreme court) presiding, and the plaintiff having elected to stand upon its complaints, judgments dismissing the actions were entered, which were affirmed on appeal by the supreme court.

The judgments of the trial court are printed on page 36 of the transcript of the record in case No. 75 and on page 26 of the transcript of the record in case No. 76.

### *Summary of Allegations of Complaint*

The complaints allege in substance that the plaintiff is a life insurance corporation organized and existing under the laws of the state of Wisconsin. It is engaged in the insurance business in some forty-two states, including Wisconsin, and in the District of Columbia. It is a mutual company, and operates upon the level premium plan. Under this plan, the cost of insurance is averaged for the years, and the plaintiff, therefore, builds up a large reserve. In the plaintiff's management of the assets of the reserve there is no segregation or special allocation of any part thereof. *The reserve is not earmarked or separately invested.* A portion of this reserve is invested in United States government bonds, which are, as is alleged in the complaints, exempt from taxation both as to principal and interest.

Pursuant to what is now sec. 76.34 of the Wisconsin statutes, and to the regulations of the insurance commissioner of the state, the plaintiff filed statements of its gross income for the years ending December 31, 1918 to 1922, inclusive. In such statements plaintiff excluded from the gross income the interest from United States tax-exempt bonds, but showed the amount of such interest received. At the time of filing such returns, the plaintiff paid a license fee under the statute above mentioned of 3% upon the gross income as shown by it, excluding therefrom such interest on United States bonds. On the 24th of October, 1923, the commissioner demanded of the plaintiff that it pay the unpaid balance of a statutory license fee of 3% on its gross income which was represented by the amount of interest received by it from such United States bonds for the years 1918 to 1922, inclusive, and following a similar and peremptory demand under date of January 3, 1924, the plaintiff on the 10th of January, 1924 paid to the state treasurer under protest the sum \$236,515.14, which represented the unpaid license fee on that part of its gross income composed of such interest for the years mentioned, together with interest thereon, for the recovery of which with interest the action in case No. 75 was brought. On February 28, 1924, plaintiff made a similar payment of \$57,743.64, which represents that part of the license fee computed on the amount of interest from United States bonds received as a part of its gross income for the year 1923, for the recovery of which with interest the action in case No. 76 was brought.

#### *Statutes Involved*

The said payments were required by the state pursuant to the terms of a law of Wisconsin which, so far as the question here is concerned (except that it now bears a dif

ferent section number), is the same as the statute which was considered and upheld in all respects by this court in *Northwestern Mutual Life Insurance Company v. Wisconsin*, 247 U. S. 132, which statute, so far as pertinent, reads as follows:

"76.34. **Life Insurance companies to pay annual license.** Every company, corporation or association transacting the business of life insurance within this state, excepting only such fraternal societies as have lodge organizations and insure the lives of their own members, and no others, shall, on or before the first day of March, in each year, pay into the state treasury as an annual license fee for transacting such business the amounts following:

"(1) **DOMESTIC COMPANIES; THREE PER CENT OF GROSS INCOME.** If such company, corporation or association is organized under the laws of this state, three per centum of its gross income from all sources for the year ending December thirty first, next prior to said first day of March, excepting therefrom income from rents of real estate upon which said company, corporation or association has paid the taxes assessed thereon, and excepting also premiums collected on policies of insurance and contracts for annuities.

"(2) **FOREIGN COMPANIES.** \* \* \*

"(3) **POWER GRANTED BY LICENSE; LICENSE FEE IN LIEU OF OTHER TAXES.** Such license, when granted shall authorize the company, corporation or association to whom it is issued to transact business until the first day of March of the ensuing year, unless sooner revoked or forfeited. The payment of such license fee shall be in lieu of all taxes for any purpose authorized by the laws of this state, except taxes on such real estate as may be owned by such company, corporation or association."

*Decision Below*

The state court held that since the license fee, by the terms and in the operation of the statute, is merely a franchise tax imposed upon a creature of the state law in return for the privileges of enjoying the powers of its creation and of doing business in the state and of an exemption from personal property taxation, and is not a property tax or a tax on income, the incidental fact that a part of the gross income of plaintiff in error consists of interest received from tax exempt United States bonds does not make such fee a tax or burden upon such bonds for the reason that the gross income including such interest is used only as the measure or yardstick to determine the amount of the license fee or franchise tax, and that the law is therefore valid. *In so holding under well established principles and the repeated decisions of this court, the state court did not err.*

## SUMMARY OF ARGUMENT

The license fee imposed upon domestic life insurance corporations by sec. 76.34, Wisconsin statutes, is a privilege or franchise tax, and not a tax on property or income from property.

*Northwestern Mutual Life Insurance Company v. State*, 163 Wis. 484;

*Northwestern Mutual Life Insurance Company v. Wisconsin*, 247 U. S. 132.

Such license fee clearly is not aimed at or intended to be or have the effect of indirect taxation of United States bonds or anything else not taxable by the state; it is imposed solely upon a domestic life insurance corporation as

an exaction for the privileges granted by the state to it which include an exemption from personal property taxation and the privilege of engaging in the life insurance business in the state. These inducements or considerations for the privilege tax are local special privileges clearly within the power of the state to grant or withhold altogether, and when granted as clearly within the jurisdiction of the state to tax as such and to lawfully measure such tax by reference to property or business or income of the corporation which, itself, is beyond the power of the state to tax.

*Northwestern Mutual Life Ins. Co. v. Wis.*, 247 U. S. 132;

*Home Insurance Company v. New York*, 134 U. S. 594;

*Plant v. Stone Tracy Co.*, 220 U. S. 197;

*Gallispie v. Oklahoma*, 257 U. S. 501;

*United States Grain Corp. v. Phillips*, 261 U. S. 106;

*Baltic Mining Co. v. Massachusetts*, 231 U. S. 68;

*Adams Express Co. v. Ohio*, 165 U. S. 194;

*Cleveland, etc. Ry. Co. v. Backus*, 154 U. S. 438;

*Delaware R. R. Tax Case*, 18 Wall. (85 U. S.) 206;

*Hamilton Company v. Massachusetts*, 6 Wall. (73 U. S.) 632;

*State Tax Railway Gross Receipts*, 15 Wall. (82 U. S.) 284;

*Kansas City, etc. R. R. Co. v. Botkin*, 240 U. S. 227;

*Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217;

*Horn Silver Mining Co. v. New York*, 143 U. S. 305;

*Kansas City M. & B. R. Co. v. Stiles*, 242 U. S. 111.

Specifically, applying the well settled rule to the cases at bar, the state has the power to exact of a corporation created by it a privilege or franchise tax or license fee and

to measure the same by a percentage of the gross income of the corporation including any part of such gross income derived from United States bonds or other tax-exempt securities.

*Home Insurance Co. v. New York*, 134 U. S. 594;

*Provident Institution v. Massachusetts*, 6 Wall. (73 U. S.) 611;

*Society for Savings v. Ostr*, 6 Wall. (73 U. S.) 594;

*Van Allen v. The Assessors*, 3 Wall. (70 U. S.) 523;

*Securities Savings & Commercial Bank v. District of Columbia*, 279 Fed. 185.

### ARGUMENT

It is well to bear in mind the language of the statute. It does not in terms impose a tax upon property or upon income, nor does its operation impose such a tax. It provides that domestic life insurance companies shall pay "as an annual license fee for transacting such business" three per centum of its gross income. The statute, therefore, in express terms declares that the fee is a license fee for transacting business—not a tax on income as such. And this court, affirming the Wisconsin supreme court, has specifically so held.

*Northwestern Mutual Life Insurance Co. v. Wisconsin*, 247 U. S. 132.

It must be conceded that the state could impose a certain definite sum as a license fee for the privilege of transacting business and in return for other privileges granted by the state to a corporation created by it. No citation of authority is needed for that proposition. The provision of the statute requiring the payment of three per cent of the

gross income of such a corporation is not essentially different in principle. It merely adopts the more just theory that the license fee for such privileges should be proportionate to the value of the privileges bestowed. In other words, the *gross income* is merely used as a *method of measuring the fee to be paid*. The fee is not in any sense a tax upon the gross income itself.

"\* \* \* It is not to be questioned that the states may tax the franchises of companies created by them, and that the tax may be proportioned either to the value of a franchise granted, or to the extent of its exercise; nor is it deniable that gross receipts may be a measure of approximate value, or, if not, *at least of the extent of enjoyment*. \* \* \*." (Italics ours.)

*State Tax on Railway Gross Receipts*, 15 Wall (82 U. S.) 284.

"The State may impose taxes upon a corporation as entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, *however arbitrary or capricious*, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable method of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the state, our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction." (Italics ours.)

*Delaware Railroad Tax*, 18 Wall (85 U. S.) 206, where the court had under consideration again the question of a franchise tax imposed by a state upon a corporation and which tax was held to be valid.

The Wisconsin statute itself is clear and unambiguous

in its provision that the license fee shall be measured by "*its gross income from all sources*." This includes income which plaintiff in error derives from its securities, whether tax-exempt or otherwise. The state court in the cases at bar has so held.

The issue is whether a state has the power to measure such an annual license fee by the gross income from all sources, including the interest from United States and other tax exempt bonds. We contend on both principle and authority that it has such power, and that the decision and judgment of the state court is right and in accordance with the decision of this court.

Substantially a similar question was presented in the fairly early case of *Van Allen v. The Assessors*, 3 Wall. (70 U. S.) 573. In this case, it appeared that the legislature of New York passed an act taxing shares of a banking association. It was held that this tax was valid and could be imposed in full without regard to the fact that a part or the whole of the capital of such association was invested in national securities declared by the statutes authorizing them to be exempt from taxation by or under state authority. The court in its opinion said, pp. 582-583:

"In the granting of chartered rights and privileges by government, especially if of great value to the corporators, certain burdens are usually, if not generally, imposed as conditions of the grant.

"\* \* \* and if Congress possessed the power to grant these new rights and new privileges, which none of the learned counsel has denied, and which the whole argument assumes, then we do not see but the power to annex the conditions is equally clear and indisputable.

"\* \* \*

It was again involved in the case of *Society for Savings v. Coite*, 6 Wall. (73 U. S.) 594. In this case, it appeared that the legislature of Connecticut enacted a law that the several savings banks of the state should pay to the treasurer a sum equal to three-fourths of one per cent of the total amount of deposits. The statute declared that this tax should be in lieu of all other taxes. It appeared that the bank had a considerable amount of its deposits invested in United States securities which were declared exempt from taxation by the states. The court held that the state could properly levy the tax and include in its computation of the amount due the deposits which were invested in such exempt securities. We quote from the opinion of the court, p. 604:

“ \* \* \* the question is whether, by the true construction of that provision, the assessment is properly to be regarded as a tax on property or as a tax on the privileges and franchises of the defendant corporation. Viewed as a tax on property the assessment, so far as respects the amount in controversy, would be illegal, as it is well settled by repeated decisions of this court that the states cannot tax the securities of the United States, declared by act of Congress to be exempted from taxation, for any purpose whatever. \* \* \*

The court then proceeded to consider whether the tax was in fact one upon property, and concluded that it was not, but that it was a tax upon the privilege of doing business, and, as such, within the power of the state to impose, regardless of what investments might be made, we quote again from the opinion, pp. 606-608:

“ Nothing can be more certain in legal decision than that the privileges and franchises of a private corporation, and all trades and avocations by which the

citizens acquire a livelihood, may be taxed by a state for the support of the state government. Authority to that effect resides in the state independent of the federal government, and *is wholly unaffected by the fact that the corporation or individual has or has not made investments in federal securities.* (Italics ours.)

"\* \* \* Fixed sums are in some instances required to be annually paid into the treasury of the state, and in others a prescribed percentage is levied on the stock, assets, or property owned or held by the corporation, while in others, the sum required to be paid is left indefinite, to be ascertained in some mode by the amount of business which the corporation shall transact within a defined period.

"Experience shows that the latter mode is better calculated to effect justice among the corporations required to contribute to the public burdens than any other which has been devised, as its tendency is to graduate the required contribution to the value of the privileges granted, and to the extent of their exercise. Existence of the power is beyond doubt, and it rests in the discretion of the legislature whether they will levy a fixed sum, or if not, to determine in what manner the amount shall be ascertained."

The question was again presented to the court in the case of *Provident Institution v. Massachusetts*, 6 Wall. (73 U. S.) 611. In this case the state of Massachusetts imposed a tax of one-half of one per cent upon the amount of the institution's deposits.

The institution had something over \$1,000,000 invested in exempt United States securities. The court again held that the investment in such securities need not be deducted in computing the amount of the tax. The court said, p. 627:

"\* \* \* Reference to the average amount of the deposits is made, not as descriptive of the subject to

be assessed, but as furnishing the basis of computing the amount of the tax to be paid by the corporation. The subject matter to be taxed is the corporation, and the average amount of the deposits within the period named furnishes the basis of computing the amount."

In the case of *Hamilton Company v. Massachusetts*, 6 Wall. (73 U. S.) 632, the court again affirmed the proposition that a state could levy a franchise tax regardless of the fact that the company may have made investments in tax-exempt securities. In this case the statute required corporations having capital stock divided into shares to pay a tax of one-sixth per cent upon the excess of the market value of all such stock over the value of its real estate and machinery. This case involved substantially the same situation as the previous cases, and was decided upon the same principles, namely, that the tax in question was one levied upon the business in return for a privilege bestowed by the state.

The case of *Home Insurance Co. v. New York*, 134 U. S. 594, is on all fours with the cases at bar and, we believe, is decisive of the question presented. The facts were as follows: A statute of New York imposed a tax upon the corporate franchise or business of the plaintiff and other corporations doing business in the state, which tax was measured by the extent of the dividends of the corporation in the current year. Part of the dividends of the corporation were derived from investment of its capital in United States bonds amounting to \$1,940,000. The company contended that the interest received on such bonds which were exempt from taxation should be deducted in determining the tax. The court held that the tax was not a tax upon the income received from the bonds but was a tax imposed in return for a privilege granted by the state

and that, being such, it could be measured by income without making it a tax upon such income. The theory is very tersely stated by the court, p. 599, as follows:

“ \* \* \* The statute designates it a tax upon the ‘corporate franchise or business’ of the company, and reference is only made to its capital stock and dividends for the purpose of determining the amount of tax to be exacted each year.”

The court then stated the rule as to the interpretation and validity of such license fees or franchise taxes.

“ \* \* \* The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name and act as a single person, with a succession of members, without dissolution or suspension of business and with a limited individual liability. The granting of such right or privilege rests entirely in the discretion of the State, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy. It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the State each year, or month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe. The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privilege it bestows. \* \* \* (Pp. 599-600.)

"The tax in the present case would not be affected if the nature of the property in which the whole capital stock is invested were changed and put into real property or bonds of New York, or of other States. From the very nature of the tax, being laid upon the franchise given by the State, and revocable at pleasure, it cannot be affected in any way by the character of the property in which its capital stock is invested. The power of the State over the corporate franchise and the conditions upon which it shall be exercised, is as ample and plenary in the one case as in the other \* \* \* (P. 601.)

"In this case we hold, as well upon general principles as upon the authority of the first two cases cited from 6th Wallace, that *the tax for which the suit is brought is not a tax on the capital stock or property of the company, but upon its corporate franchise, and is not therefore subject to the objection stated by counsel, because a portion of its capital stock is invested in securities of the United States.*" (P. 604.) (Italics ours.)

The above case, as has been stated, seems conclusive and binding in the decision of the cases at bar. The tax imposed was a tax measured by the dividends. There is no difference in measuring taxes by dividends than in measuring a license fee by gross income, as part of the income which produces the dividends is as much derived from the tax-exempt securities as is the part of the gross income. If the tax imposed in the *Home Insurance Company* case was valid, then necessarily the license fee imposed in the instant cases is valid.

Another case decided by this court which is squarely in point in the matter under consideration, and commented and relied upon by the state court in its opinion is, *Flint v. Stone Tracy Co.*, 220 U. S. 107. This case involved a

tax levied by the United States government under a law which required corporations, joint stock companies and insurance companies "to pay annually a special excise tax with respect to the carrying on or doing business \* \* \* equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year." The court held that the tax was one, not upon property, but an excise tax upon business, saying, pp. 145-146:

"\* \* \* It is therefore apparent, giving all the words of the statute effect, that the tax is imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business \* \* \*."

"\* \* \* In other words, the tax is imposed upon the doing of business of the character described and the measure of the tax is to be the income, with the deduction stated, received not only from property used in business, but from every source. \* \* \*"

The contention was made that the tax, in so far as it was measured by the income of bonds nontaxable under the federal statutes, and of municipal and state bonds, was invalid. Manifestly the federal government could not tax state bonds, as they are agencies used by the state and the same prohibitions apply as apply to the state taxing federal bonds or agencies. No citation of authority is necessary for such an obvious proposition. The court, however, held that income on such exempt securities could be included in the income used to measure the tax. We quote certain relevant portions of the opinion:

"The tax under consideration, as we have construed the statute, may be described as an excise upon

the particular privilege of doing business in a corporate capacity, i. e., with the advantages which arise from corporate or quasi-corporate organization; or, when applied to insurance companies, for doing the business of such companies. \* \* \* (P. 151.)

Here, then, is an express judicial recognition of the fact that a tax can be imposed for the privilege of doing business of an insurance company. After reviewing a number of cases which had been cited by the companies contesting the tax, the court distinguished such cases, and made, pp. 163-165, the following significant statement:

"There is nothing in these cases contrary, as we shall have occasion to see, to the former rulings of this court which holds that where a tax is lawfully imposed upon the exercise of privilege within the taxing power of the state or nation the measure of such tax may be the income from the property of the corporation, although a part of such income is derived from property in itself non-taxable. The distinction lies between the attempt to tax the property as such and to measure a legitimate tax upon the privileges involved in the use of such property. \* \* \*

"It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is non-taxable. Applying that doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part at least, property which as such could not be directly taxed. See in this connection *Maine v. Grand Trunk Ry. Co.*, 142 U.

S. 217, as interpreted in *Galveston, Harrisburg & San Antonio Ry. Co. v. Texas*, 210 U. S. 217, 226."

In *Securities Savings and Commercial Bank v. District of Columbia*, 279 Fed. 185, decided by the Court of Appeals of the District of Columbia in 1922, the plaintiff was a savings bank incorporated under the laws of West Virginia, doing business in the District of Columbia. Under an act of congress a tax was levied upon the *gross* earnings of the bank, and these earnings included several thousand dollars of interest derived from Liberty bonds, Victory bonds, War Savings stamps, and certificates of indebtedness of United States which, like the United States bonds owned by the plaintiff in error here, were exempt from all taxation. The tax on the earnings derived from these securities was paid under protest and an action instituted by the bank to recover the amount paid on the ground that the tax was void as being in effect a tax upon such tax exempt securities. The court held the tax valid as a franchise tax within the power of congress to impose.

In this connection it should be noted that in the brief of the plaintiff in error counsel attempt to distinguish between a license fee imposed by the state for doing business as a corporate entity where such fee is measured by the gross income, derived partly from tax exempt bonds, and where such a fee is measured merely by the net income. Counsel contend that when such a fee is imposed by the state and the gross receipts, including income derived from nontaxable securities, are used as a basis for measuring the amount of such fee, it is void. Counsel concede that such a tax may be valid if measured by the net income.

It is submitted that there is no valid distinction. The very same principle applicable in the one case is applic-

able in the other, and, if the latter tax is valid, as is conceded, then the former is also.

To illustrate: Let us suppose that the gross income of a corporation subject to such license fee is \$750,000 and that the net income after deducting from the gross income expenses of operation, etc., is \$100,000. Let us suppose that a portion of the gross and net income is derived from tax-exempt securities. Can it validly be said that merely because of the difference in the amount between the gross and net income a different principle of law should be applied? Clearly not. Irrespective of whether the amount of the license fee is measured by the gross income or the net income, the income derived from such tax-exempt bonds is used, in both cases, in computing the amount of the tax. In neither case is a tax levied on the securities themselves. Hence such fee does not burden the government in any manner. To reiterate, the income from the investments is used merely as a measure of the value of the property and franchise lawfully taxable in the state, and there can be no valid distinction between such a tax whether measured by the gross income or whether measured by the net income.

In fact, counsel's argument (as is pointed out in the opinion of the state court, p. 47 record in case No. 75-159 Wis. 103, 113) has already been answered and the distinction rejected by this court in *Flint v. Stone Tracy Co.*, *supra*, 220 U. S. 107.

In the case of *Home Insurance Co. v. New York*, *supra*, 134 U. S. 594, the court considered the cases of *McCulloch v. Maryland*, 4 Wheat. (17 U. S.) 316; *Weston v. City Council of Charleston*, 2 Pet. (27 U. S.) 449; and other

cases relied upon in the brief of plaintiff in error. It is unnecessary to consider these cases in detail, as they are covered in the opinion in the *Home Insurance Company* case; it is sufficient to observe that these cases and others cited by counsel involve the broad doctrine that a state cannot by taxation impede, burden or in any manner control the operation of the constitution and the laws enacted by congress to carry into execution the powers vested in the general government. The court, however, after a consideration of the cases cited, decided that the decisions in such cases were not in any way applicable to the imposition of a tax or license upon the privilege of doing business, and, as has been previously shown in the brief, held that such tax was valid even when tax-exempt securities were included in the measure used to determine the amount of the tax.

“ \* \* \* A tax very well may be upheld as against any casual effect it may have upon the bonds of the United States when passed with a different intent and not aimed at them \* \* \* ”

*Miller v. Milwaukee*, 272 U. S. 713, 715.

When the Wisconsin statute involved here was before this court in 1918 at the suit of the plaintiff in error (247 U. S. 132) we believe the record showed that it had large investments in tax-exempt United States bonds and derived a part of its gross income from interest therefrom. However, plaintiff did not then put its claim of invalidity of the license fee on that ground, but only on the contention that it was engaged in interstate commerce and that such license fee imposed a burden on interstate commerce which was overruled by this court. So it is clear that the statute

never has been aimed at taxing or burdening either United States bonds or interstate commerce.

In the former case plaintiff directed attention to the fact that it conducted a vast investment business, loaning money on property situated in many of the states of the Union; that money and various credits were continually passing from one state to another, and that, therefore, it was engaged in interstate commerce. It therefore contended that the license fee imposed by the statute now under consideration constituted an unlawful interference with interstate commerce. Both the Wisconsin court and this court proceeded upon the assumption, or rather conceded for the sake of their respective opinions, that the business transacted by plaintiff constituted interstate commerce, but held that the tax imposed did not create an unlawful interference with such commerce.

### CONCLUSION

It is considered as firmly established that the tax in the instant case is valid when tested in the light of the uniform current of decisions of this court. In the light of these decisions and the principles on which they rest, the judgments should be affirmed.

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